Supreme Court, U.S.
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No. 06-729

IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection.
Petitioners,

-v.-

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, LTD., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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November 20, 2006

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FOR WRIT OF CERTIORARI
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(Reported at 451 F.3d 77)

REPRODUCED FOLLOWING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term 2005

(Submitted: November 21, 2005

Decided: June 13, 2006)

Docket Nos. 03-7203 (L); 03-7253 (XAP)

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDER-ATED SPROTSMEN'S CLUBS OF USLTER COUNTY, INC. and RIVERKEEPER, INC.,

Plaintiffs-Appellees-Cross-Appellants,

- v. -

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants-Third-Party-Plaintiffs-Appellants-Cross-Appellees,

JOEL A. MIELE, SR., COMMISSIONER of the Department of Environmental Protection,

Defendant-Appellant-Cross-Appellee,

- v. -

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVA-TION, and ERIN M. CROTTY, Commissioner of the

New York State Department of Environmental Conservation,

Third-Party-Defendants-Appellees.

Before:

WALKER, Chief Judge,
OAKES and JACOBS, Circuit Judges.

Appeal from a decision of the United States District Court for the Northern District of New York (Frederick J. Scullin, Jr., *Chief Judge*) holding the City of New York liable for violations of the Clean Water Act, imposing civil penalties, and awarding injunctive relief to Plaintiffs-Appellees-Cross-Appellants.

AFFIRMED in part and REMANDED in part.

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Chief, Environmental Protection Bureau, Gordon J. Johnson, Deputy Bureau Chief, Robert H. Easton, Assistant Solicitor General, *on the brief*), Albany, New York, for *Third-Party-Defendants-Appellees.*

JOHN M. WALKER, JR., Chief Judge:

The City of New York ("the City") operates the Shandaken Tunnel ("Shandaken Tunnel" or "the Tunnel") as part of its water-management system that delivers drinking water to New York City and the immediate surrounding area. Water from the Tunnel, which is high in turbidity, discharges into the Esopus Creek ("Esopus Creek" or "the Creek"), a trout stream used for flyfishing and other recreational activities. The Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., and Riverkeeper, Inc. (collectively "Catskills") brought a citizen suit against the City, alleging that the City's use of the Tunnel without a permit violated the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251 et seq. In an October 21, 2001, opinion, we held that the CWA permit requirements apply to the Shandaken Tunnel discharges and remanded to the district court. On remand, the district court assessed a $5,749,000 civil penalty against the City and ordered the City to obtain a permit for the operation of the Tunnel. This appeal followed.

BACKGROUND

I. Relevant Clean Water Act Provisions

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As part of the program to achieve this goal, the Act states that "the discharge of any pollutant by any person shall be unlawful," *id.* § 1311(a), unless it is done in compliance with other provisions of the Act. One of those other provisions, the National Pollutant Discharge Elimination System ("NPDES"), *id.* § 1342(a), establishes a permit system. Under this provision, the Environmental Protection Agency ("EPA") or state administrators may issue a permit for the discharge of a pollutant at levels below the effluent limitations specified in the permit. *Id.* The CWA broadly defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12).

Although the CWA establishes this federal permitting scheme, the Act also recognizes that states retain the primary role in planning the development and use of land and water resources, *id.* § 1251(b), allocating quantities of water within their jurisdictions, *id.* § 1251(g), and regulating water pollution, as long as those state regulations are not less stringent than the requirements set by the CWA, *id.* § 1370.

II. The Shandaken Tunnel and the Esopus Creek

As part of the water system that supplies New York City with its drinking water, the City maintains the Schoharie Reservoir in the Catskill Mountains. To deliver this water eventually to New York City, water from the Schoharie Reservoir is diverted through the eighteen-mile Shandaken Tunnel and discharged into the Esopus Creek.

The Creek's water, in turn, flows into the Ashokan Reservoir, through the Catskill Aqueduct, to a series of reservoirs and tunnels along the east side of the Hudson River, and eventually to New York City. Absent the man-made diversion through the Tunnel, water from the Schoharie Reservoir would never reach the Esopus Creek. *Catskill Mountains Ch. of Trout Unltd. v. City of New York*, 273 F.3d 481, 484 (2d Cir. 2001) (*"Catskills I"*).

Because water in the Schoharie Reservoir contains suspended solids from both natural and man-made causes, discharges from the Tunnel into the Creek are more turbid[1] than the waters of the Esopus. This turbidity impairs use of the Esopus for fly fishing and other recreational activities. Pursuant to state regulations, the City has been studying ways to reduce the turbidity in the water discharged from the Tunnel but so far has failed to find a way to do so. Until this lawsuit, neither the EPA nor the New York State Department of Environmental Conservation ("NYDEC"), the agency that enforces the CWA in New York State, had ever regulated the turbidity in the Tunnel under the CWA's permitting scheme.

III. Procedural History

In March 2000, Catskills, recreational users of the Esopus Creek, brought this citizen suit under the CWA alleging that the City's discharge of turbid water from the Tunnel violated 33 U.S.C. § 1311(a), which, as we said, prohibits "the discharge of any pollutant" without a discharge permit. The district court dismissed the claim on the pleadings, holding that the discharge from the Tunnel did not constitute an "addition" of a pollutant to the Creek under 33 U.S.C. § 1362(12).

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[1] The parties do not contest that turbidity qualifies as a pollutant under the CWA.

In October 2001, we reversed after concluding that the discharge of water containing pollutants from one distinct water body into another is an "addition of [a] pollutant" under the CWA. *Catskills I*, 273 F.3d at 491-93. As a result, we determined that the discharge from the Tunnel into the Creek requires a permit.

On remand from *Catskills I*, the district court granted summary judgment to the plaintiffs and went on to deter-mine the civil penalties to be assessed against the City. The district court concluded that no penalties should be imposed for the City's actions prior to June 22, 2002, eight months after *Catskills I* put the City on notice that it needed a permit for the Shandaken discharges. Finding a delay of more than eight months unreasonable, however, the district court imposed the maximum penalty for the period from June 22, 2002, to December 31, 2002, when the City filed its permit application; the penalty totaled $5,749,000. This appeal followed.

DISCUSSION

In this appeal, the City asks us to reconsider our holding in *Catskills I* that the discharge of turbid water from the Shandaken Tunnel into the Esopus Creek requires a permit. The City also argues that the penalty of $5,749,000 is too high. In a cross-appeal, Catskills argues that amount is too low.

We are free to reconsider our holding in *Catskills I* if there are cogent, compelling reasons for doing do, such as a change in controlling law or newly discovered facts. *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000). Determining whether we should reconsider requires briefly revisiting our reasoning in *Catskills I*.

I. Catskills I

In concluding that the transfer of turbid water from the Shandaken Tunnel to the Esopus Creek qualified as the "discharge of [a] pollutant," 33 U.S.C. § 131 l (a), requiring an NPDES permit, *Catskills I* first noted the CWA's broad definition of the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). Because the Shandaken Tunnel "plainly qualifies as a point source," *Catskills I*, 273 F.3d at 493, our holding rested, in principal part, on the meaning of "addition," which the CWA leaves undefined. We decided that "addition" means the introduction into navigable water from the "outside world,"[2] with the outside world being defined as "any place outside the particular water body to which pollutants are introduced." *Id.* at 491.

In reaching this result, we distinguished the "dams cases," on which the City relied. In *National Wildlife Federation v. Gorsuch*,[3] 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*,[4] 862 F.2d 580 (6th Cir. 1988), two sister circuits held that water taken from a water source and then released back into

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[2] This phrase comes from the definition of the word "addition" urged by the EPA on the court in *National Wildlife Federation v. Gorsuch*, 693 P.2d 156, 175 (D.C. Cir. 1982). In *Gorsuch*, the EPA argued that an "addition of a pollutant" takes place only if the point source introduces a pollutant into the water from the outside world. *Id.*

[3] *Gorsuch* involved water released from a dam that, due to its impoundment, had a low dissolved oxygen rate, variable water temperature, high concentrations of dissolved minerals and nutrients, increased sediment levels, and was supersaturated with air---attributes that can be harmful to downstream waters and the wildlife inhabiting them. *Id.* at 161-64.

[4] *Consumers Power* involved water pumped from Lake Michigan through the turbines of a hydroelectric power plant and then released back into the lake-a process that pureed fish and other aquatic life and then released their remains as "pollutants" back into the lake. 862 F.2d at 583.

that same source was not an "addition" to navigable waters under the CWA, despite the fact that the water so released contained "pollutants." 693 F.2d at 183; 862 F.2d at 587. This case differed from the dams cases, we believed, because the Tunnel discharges water into the Creek from a source that is a different, distinct body of water. *Catskills I*, 273 F.2d at 491-92. In *Catskills I*, we analogized the dams cases to a soup ladle scooping soup out of a pot and returning it to that pot, a type of water transfer known as an intrabasin transfer. The Tunnel's discharge, in contrast, was like scooping soup from one pot and depositing it in another pot, thereby adding soup to the second pot, an interbasin transfer. Interbasin transfers, we held in *Catskills I*, constitute "additions," rendering the City's reliance on the dams cases misplaced. *Id.* at 492.

We also rejected the City's "unitary water" theory of navigable waters, which posits that all of the navigable waters of the United States constitute a single water body, such that the transfer of water from any body of water that is part of the navigable waters to any other could never be an "addition." We pointed out that this theory would lead to the absurd result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an "addition" of pollutants and would not be subject to the CWA's NPDES permit requirement. *Id.* at 493. *Catskills I* rejected the "unitary water" theory as inconsistent with the ordinary meaning of the word "addition." *Id.*

Finally, we rejected the contention that the provisions of the CWA reserving power to the states could overcome the express permit requirement for water transfers that result in the addition of pollutants. We pointed out that "like many complex statutes ... the CWA balances a welter of consistent and inconsistent goals" but that "none of the statute's broad purposes sways us from what we find to be the plain meaning of its text." *Id.* at 494.

II. Intervening Legal Developments

Following *Catskills I*, there have been two relevant legal developments. The Supreme Court decided *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), and the EPA issued an agency interpretation addressing the applicability of the CWA's NPDES permit requirement to water transfers such as the one at issue in this case.

Miccosukee was a citizen suit contending that an NPDES permit is necessary for the South Florida Water Management District to operate a pump that conveys water from a polluted canal to an undeveloped wetland. The pump serves both to prevent the basin surrounding the canal from flooding and to preserve the wetland area. *Id.* at 100-01. Consistent with the dams cases, *Miccosukee* held that if the canal and the wetlands are not meaningfully distinct water bodies-an unresolved factual question-no NPDES permit is required. *Id.* at 112; *cf. S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1850 (2006) ("[I]f two identified volumes of water are simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants." (quoting *Miccosukee*, 541 U.S. at 109)).

On August 5, 2005, the EPA issued an agency interpretation regarding whether the movement of pollutants by a water transfer from one navigable water to a separate one is the "addition" of a pollutant subjecting the activity to the NPDES permitting requirement. According to the EPA, several provisions of the CWA indicate Congress's intent that such transfers be regulated by the states, not by the federal NPDES program. The EPA interpretation argues that, rather than primarily focusing on the meaning of the word "addition," as we did in *Catskills I*, a "holistic" view of the statute that takes this intent into account is appropriate.

The City concedes that this EPA interpretation is not entitled to *Chevron* deference. *See Chevron U.S.A., Inc. v. Natural Res. Def.*, 467 U.S. 837 (1984). Instead, the deference described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and *United States v. Mead Corp.*, 533 U.S. 218 (2001), is applicable. We thus defer to the agency interpretation according to its "'power to persuade.'" *Mead*, 529 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140).

III. Reconsideration of Catskills I

We turn to the City's request that we reconsider our holding in *Catskills I*. Rather than offering "compelling and cogent" reasons for reconsideration, however, the City basically serves us warmed-up arguments that we rejected in *Catskills I*, with the additional contention that either the Supreme Court's *Miccosukee* decision, the EPA interpretation, or both compel a result different from the one we reached earlier. We disagree.

The City first argues that new evidence developed below and the Supreme Court's decision in *Miccosukee* invalidate the distinction between intrabasin and interbasin water transfers. The "new evidence" the City points to simply shows that the release of water from a dam into down-stream water is no less likely to add pollutants as would a transfer of water from a distinct water body. Having considered the dams cases in *Catskills I*, we were aware of the presence of pollutants in intrabasin transfers. *Gorsuch* includes an extensive discussion of the nature of water quality changes wrought by dammed water. 693 F.2d at 161-64. And in *Consumers Power*, the water at issue contained fish that were pulverized as they passed through the turbines of a hydroelectric power plant and then were reintroduced into Lake Michigan as biological waste. 862 F.2d at 582. Nonetheless, *Catskills I* concluded that, despite the presence of pollutants in both interbasin and intrabasin transfers, interbasin transfers are properly distinguished

because they "add" pollutants to the navigable waters. *See Catskills I*, 273 F.3d at 492. This has not changed.

Nor does the Supreme Court's decision in *Miccosukee* render inter- and intra-basin transfers indistinguishable. *Miccosukee* cited with approval our "soup ladle" analogy and the distinction between inter- and intra-basin transfers. 541 U.S. at 109-10. The Court remanded the case to the district court to determine whether the water bodies in question were "two pots of soup, not one." *Id.*; *cf. S.D. Warren Co.*, 126 S. Ct. at 1850 n.6. This remand would be unnecessary if there were no legally significant distinction between inter- and intra-basin transfers.

The City also reasserts the unitary-water theory of navigable waters. Our rejection of this theory in *Catskills I*, however, is supported by *Miccosukee*, not undermined by it. In that case, the Supreme Court pointed out that several provisions of the CWA seem to distinguish among water bodies that are part of the navigable waters of the United States, implying that, at least in the context of the CWA, the unitary-water theory has no place. 541 U.S. at 105-09. *Miccosukee* also noted that the EPA has never endorsed the theory in any administrative documents. *Id.* at 107. Indeed, the Supreme Court pointed out that "the agency once reached the opposite conclusion." *Id.* Thus, *Miccosukee* did no more than note the existence of the theory and raise possible arguments against it. This does not constitute a change of controlling law warranting reconsideration of this court's previous decision on the issue.

Finally, the City points to the "holistic" argument, reflected in the EPA's 2005 agency interpretation,[5] to assert

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[5] As noted above, the EPA's agency interpretation is entitled to deference only insofar as it has the power to persuade. *See Skidmore*, 323 U.S. at 140. Because the EPA and the City assert the same

that the proper allocation of rights and responsibilities between the states and the federal government for water regulation necessitates a reconsideration of our holding in *Catskills I*. This proposition is supported by amicus curiae briefs filed by western states who fear that the *Catskills I* rule will upend state regulation of water rights.

The argument relies on sections 101(g) and 510 of the CWA, 33 U.S.C. §§ 1251(g), 1370, both of which expressly reserve the authority of states over the water within their jurisdiction, as well as section 304(f) of the CWA, 33 U.S.C. § 1314(f), which governs non-point-source pollution. Section 101(g) provides that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired." Section 510 states that "[e]xcept as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." Because, according to the City, there are no feasible means of reducing the pollution in the Tunnel, a permit requirement would effectively amount to a ban on the transfer of water from the Tunnel to the Creek and thereby interfere with New York's statutory water allocation rights.

This argument, too, was raised by the City in *Catskills I*, albeit less elaborately, and, as with the interbasin/ intrabasin distinction and the unitary-waters theory, *Miccosukee* fails to alter the legal landscape to support the "holistic" theory. The power of the states to allocate *quantities* of water within their borders is not

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contentions on this point, we address the City and the EPA's position as one. For reasons discussed below, we do not find the argument persuasive and therefore decline to defer to the EPA.

inconsistent with federal regulation of water *quality*. Section 510 provides for the preservation of the preexisting rights of states not in conflict with the other requirements of the CWA ("except as expressly proved in this chapter"). Indeed, the Supreme Court has held that "[s]ections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls. . . ." *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 720 (1994). To be sure, *Miccosukee* acknowledged the possibility that "construing the NPDES program to cover such transfers would . . . raise the costs of water distribution prohibitively, and violate" section 101(g). *Miccosukee,* 541 U.S. at 108. But in the next sentence, the Court recognized that, despite their potential cost, such permits nevertheless might be necessary to protect water quality. *Id.*

Nor does *Miccosukee* support the EPA and the City's argument that the non-point-source provisions of the CWA indicate congressional intent to leave interbasin water transfers outside the NPDES permitting scheme. Section 304(f) of the CWA directs the EPA to study and make recommendations for the regulation of pollutants spread by non-point sources, such as "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of . . . flow diversion facilities." 33 U.S.C. § 1314(f)(2)(F). From this language, the EPA and the City claim that Congress intended that changes in the circulation of navigable waters caused by the construction of "flow diversion facilities," such as the Tunnel, be exempt from the permit requirements that apply to point sources. As the Supreme Court pointed out in *Miccosukee*, however, "1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition." 541 U.S. at 106.

In the end, while the City contends that nothing in the text of the CWA supports a permit requirement for interbasin transfers of pollutants, these "holistic" arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language. NPDES permits are required for "the discharge of any pollutant," 33 U.S.C. § 1311(a), which is defined as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). It is the meaning of the word "addition" upon which the outcome of *Catskills I* turned and which has not changed, despite the City's attempts to shift attention away from the text of the CWA to its context. In *Catskills I*, we pointed out that complex statutes often have seemingly inconsistent goals that must be balanced. 273 F.3d at 494. The CWA seeks to achieve water allocation goals as well as to restore and maintain the quality of the nation's waters. The City and the EPA would have us tip the balance toward the allocation goals. But in honoring the text, we adhere to the balance that Congress has struck and remains free to change.

The City's final argument for reconsideration is that other provisions of federal and state law are more appropriate means of regulating the water discharged from the Shandaken Tunnel. The City points to the Safe Drinking Water Act, which limits the levels of contaminants that are allowed in public drinking water; section 303(d) of the CWA, which regulates pollution levels resulting from pollution from both point and non-point sources; and various provisions of state law that regulate water quality. While these provisions no doubt contribute to the goals of pollution reduction and regulation, the City does not explain how their existence invalidates a separate, independent requirement imposed by the permitting scheme of the CWA.

The City's plea for reconsideration appears to rest upon the assumption that regulating the discharge from the Tunnel would effectively require that the flow be stopped altogether. This claim seems to us exaggerated. We think the flexibility built into the CWA and the NPDES permit scheme, a flexibility that the City has endorsed in a related proceeding,[6] will allow federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either.

We conclude this section with a somewhat detailed and technical accounting of the flexibilities that exist. Effluent limitations contained in NPDES permits fall into two categories: technology-based effluent limits[7] ("TBELs") and water-quality-based effluent limits ("WQBELs").[8] Where, as here, no applicable national TBELs have been set, the permit-writer may set TBELs using best professional judgment. *See* 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3. In doing so, NYDEC will consider the available technologies, costs in relation to effluent reduction benefits, engineering aspects of various control techniques, available best management practices, and nonwater-quality environmental impacts. *See* 40 C.F.R. § 125.3(c), (d). This process thus affords the permit-writer "considerable flexibility in establishing permit terms and

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[6] The City has acknowledged the NPDES system's flexibility in hearings related to its permit application. *See In re Application of the New York Cite Department of Environmental Protection*, DEC Application No. 3-5150-00420/00001, 2005 N.Y. Env. Lexis 40, at *24, *26 (June 22, 2005) (Ruling on Issues and Party Status).

[7] Technology-based limits are based on the effluent levels that can be achieved through the use of various water treatment technologies. *See* 40 C.F.R. § 125.3.

[8] Water-quality-based limits are those limits needed to ensure the appropriate water quality of the receiving water body. That water quality is specified by the state in which the water body is located.

conditions." EPA, NPDES Permit Writers' Manual 69 (1996). Only if the TBELs established by the NYDEC prove insufficient to achieve the water quality standards set by the state for the Esopus Creek[9] will more stringent WQBELs be adopted. 33 U.S.C. § 1312(a); 40 C.F.R. § 122.44(d).

If the City is unable to comply with the effluent limitations adopted by the NYDEC, CWA provisions and implementing regulations still provide means of enabling the NYDEC to issue a valid permit to the City. The permit may include a schedule of compliance, allowing the permittee to achieve compliance over time. 33 U.S.C. § 1362(17); 40 C.F.R. § 122.47. Indeed, the current draft permit prepared by the NYDEC in this case includes a compliance schedule that requires the City to investigate both technological and structural solutions to the turbidity problem and to implement those solutions according to a specified schedule. See NYS Env. Notice Bulletin, Notice of Completed Application for Shandaken Tunnel Outlet 7-9 (August 4, 2004).

Second, the NYDEC may allow a variance to WQBELs if the permittee demonstrates that achieving the effluent limitation contained in the permit is not feasible. 40 C.F.R. § 131.13; N.Y. Comp. Codes R. & Regs. tit. 6, § 702.17(b).[10] A variance is temporary and must include

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[9] With respect to turbidity for water bodies like the Esopus Creek, New York's water quality standards require that there be "[n]o increase that will cause a substantial visible contrast to natural conditions." N.Y. Comp. Codes R. & Regs. tit. 6. § 703.2.

[10] Under N.Y. Comp. Codes R. & Regs. tit. 6, ti 702.17, the City might be eligible for a variance on the basis that its compliance with the existing standard is precluded by "naturally occurring pollutant concentrations," id. § 702.17(b)(l); "human-caused . . . sources of pollution," id. § 702.17(b){3); "dams, diversions or other types of hydrologic modifications," id. § 702. 17(b)(4); or the fact that

conditions to assure that the permittee makes "reasonable progress . . . toward achieving the [original] effluent limitations." *Id.* § 702.17(e)(2). It may be renewed subject to the same requirements. *Id.* § 702.17(g). Because the City is investigating means of reducing the turbidity of the Tunnel's discharge pursuant to state requirements, a temporary variance might well provide the time necessary to implement any reasonable and feasible solutions to the turbidity problem.

The draft Shandaken Tunnel permit issued by the NYDEC on August 4, 2004, illustrates additional flexibilities. The draft permit varies turbidity level restrictions by season, accepting higher levels at times when the natural turbidity level of the Creek is higher; it also contains exemptions from the effluent limitations when necessary to avoid drought conditions, to remedy emergency threats, to avert threats to public health or safety, or to allow repairs to the Schoharie Reservoir. *See* NYS Env. Notice Bulletin, Notice of Completed Application for Shandaken Tunnel Outlet 3, 4 n.2 (August 4, 2004).

The draft permit shows that the NPDES permit scheme can ensure that the water discharged from the Shandaken Tunnel will continue to meet the City's needs without unnecessarily sacrificing progress toward water quality goals. We find the City's position, that federal regulation of interbasin water transfers will lead to the termination of those transfers in contravention of the rights explicitly reserved to the states, to be alarmist and unwarranted.

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compliance would "result in substantial and widespread economic and social impact," id. § 702,17(11)(6).

At bottom, the City's arguments for reconsideration of our holding in Catskills I are simply embellishments of those made in that case. Neither these arguments nor any intervening developments lead us to conclude that our earlier holding was reached in error or should otherwise be modified. We note that every other court faced with this issue has reached the same conclusion. See N. Plains Res. Council v. Fidelity Exploration & Dev. Co.,[11] 325 F.3d 1155 (9th Cir. 2003); *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*,[12] 280 F.3d 1364 (1 1th Cir. 2002); *Dubois v. U.S. Dep't ofAgric.*,[13] 102 F.3d 1273 (1st Cir. 1996). While we recognize the incremental administrative burden our interpretation entails, we have little doubt that it nevertheless permits the City to deliver drinking water to its citizens while furthering the CWA's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

IV. Civil Penalty

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[11] Northern Plains held that the discharges of groundwater derived from the extraction of coal bed methane into a river requires an NPDES permit. The court reasoned that the alteration of the chemical integrity of the river resulting from those discharges constituted an addition of a pollutant because such groundwater would not have flowed into the river but for the company's methane extraction processes. 325 F.3d at 1163.

[12] Before the Supreme Court granted certiorari in *Miccosukee*, the Eleventh Circuit held that the transfer of water that was high in phosphorus from a canal to a wetlands area required an NPDES permit. 280 F.3d at 1366, 1368-69.

[13] Dubois held that, when a ski area pumped water from a polluted river and discharged it into a pristine pond into which it otherwise would not

(continued...)

have flowed as part of a snow-making process, an NPDES permit was required for the discharge. 102 F.3d at 1296-99.

Both sides attack the $5,749,000 civil penalty imposed on the City by the district court. District courts have broad discretion in calculating civil penalties under the CWA. *See Tull v. United States*, 481 U.S. 412, 427 (1987) (noting that "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act"); *United States v. Smithfield Foods, Inc.*, 191 F.3d 5 16, 526 (4th Cir. 1999); *Hawaii's Thousand Friends v. Honolulu*, 821 F. Supp. 1368, 1395 (D. Haw. 1993). A district court's findings of fact in support of a CWA penalty are reviewed for clear error, *e.g., Smithfield Foods, Inc.*, 191 F.3d at 526; *Sierra Club, Lone Star Ch. v. Cedar Point Oil Co.*, 73 F.3d 546, 573 (5th Cir. 1996); *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 79 (3d Cit.. 1990), and the district court's determination of the penalty based on those facts is reviewed for abuse of discretion, *e.g., Smithfield Foods,* 191 F.3d at 526; Sierra Club, 73 F.3d at 573. In calculating civil penalties under the CWA, the court may begin either with the violator's estimated economic benefit from noncompliance (known as the "bottom-up" method) or with the statutory maximum allowable penalty (known as the "top-down" method). E. g., Smithfield Foods, 191 F.3d at 528 & n.7; United States v. Man. Auth. of Union Twp., 150 F.3d 259, 265 (3d Cir. 1998). This starting figure then may be adjusted after considering the six factors enumerated in section 309(d) of the CWA: (1) the seriousness of the violations; (2) the economic benefit resulting from the violation; (3) any history of violations; (4) good-faith efforts to comply with applicable requirements; (5) the economic impact of the penalty on the violator; and (6) other matters as justice may require. 33 U.S.C. § 1319(d). E.g., Sierra Club, 73 F.3d at 528, n.7. The court below opted to use the "top-down" method. Although neither party objected to this general approach, both sides take issue with the details of its implementation.

The district court began with the maximum statutory penalty and reduced that number due to factors mitigating in the City's favor. First, the district court found that the seriousness factor mitigated in favor of the City. Second, because the City's belief that it did not need a permit to operate the Tunnel was reasonable until the October 2001 decision of this court, the district court determined that the City should not be penalized for its history of violations. Third, the district court credited the City's ongoing efforts to reduce the turbidity of the water in the Tunnel pursuant to non-CWA regulation and its eventual application for a NPDES permit as indicating a good-faith effort to comply with applicable requirements. Finally, the district court considered the City's reasonable belief that a CWA permit was not necessary to be a mitigating factor.

Catskills faults the district court for its determination that the seriousness factor mitigated in favor of the City. This determination was based on three considerations: the pollution at issue resulted from natural conditions that caused turbidity and not toxic pollutants; there was no evidence that downstream fish were adversely affected by the discharge; and finally, the discharge, while turbid, actually improved the habitat for trout by raising low water levels. Because these findings have evidentiary support, we will not disturb them or the district court's conclusion that, taken together, they were a mitigating factor.

Both parties take issue with the district court's June 22, 2002, starting date for penalties, after which the court imposed the maximum penalty. Catskills argues that the starting date should have been October 21, 2001, the date of Catskills I, while the City contends that December 2002 would have been reasonable and that, in any event, the mitigating factors should have reduced the penalty imposed after the starting date. The district court did impose the

maximum daily penalty, but for only about nine per cent of the period for which the district court could have penalized the City.[14] The district court's choice of starting date accounted both for a reasonable time for the City to come into compliance with the CWA and for the mitigating factors; it will be sustained.

Both parties also attack the penalty figure based on the "economic benefit resulting from the violations" factor. The City argues that it is receiving no economic benefit from operating the Tunnel without a permit, so this factor should be treated as a mitigating factor. Catskills, on the other hand, argues that the City reaped a benefit by not having to build a filtration plant to screen the turbidity from the Tunnel's water, which Catskills says would cost $27 million. Even assuming the feasibility of such a plant, as to which the district court was skeptical, the district court found that construction of the plant would not have begun until 1995 at the earliest. Therefore, only costs that would have been incurred after that date, a figure consider-ably below $27 million, would be appropriately considered. In addition, there is a substantial question as to whether the City should be faulted for not building a plant during a period (prior to Catskills f) in which it did not believe it was in violation of the CWA. Considering the evidence on both sides of this issue, the district court did not abuse its discretion in determining that the issue of cost savings to the City from not building a plant should be deemed neither a mitigating factor nor a cause for in-creased penalties.

Finally, Catskills challenges the City's good faith belief that it did not need a permit to operate the Tunnel.

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[14] Catskills filed its complaint on March 31, 2000. Because the CWA has a five--year statute of limitations, 28 U.S.C. ti 2462, that is tolled sixty days before the filing of a complaint, Sierra Club v. Chevron U.S.A.. Inc., 834 F.2d 1517, 1524 (9th Cir. 1987), January 30, 1995, is the date on which the City became liable for penalties.

The district court's determination that the City had such a good faith belief, based on credibility assessments, is deserving of deference and nothing in the record leads us to question it. Neither the EPA nor the NYDEC had ever indicated the necessity of a permit. The district court's decision not to penalize the City for a reasonable, albeit incorrect, interpretation of a statute is not an abuse of discretion.

In arriving at the penalty imposed below, the district court carefully considered the six factors laid out in section 309(d) of the CWA, relied on facts not clearly erroneous, and did not abuse its discretion in deciding the penalty. We have, however, uncovered a calculation error. The district court stated that the maximum statutory penalty for the final 131 days of 2002 was $31,500 per day. In fact, the maximum daily penalty remained $27,500 until March of 2004. 40 C.F.R. § 19.4. Thus, the maximum possible penalty was $62,725,000, not $63,249,000 as stated by the district court. Had the district court been aware that its initial calculation of the statutory maximum was $524,000 too high, it might have reduced the penalty by that amount. Or, even being aware of the true statutory maximum, it might have imposed the same penalty. Or it might have arrived at a penalty somewhere in between. Because we have no way to determine how the district court's calculation of the penalty would have differed, if at all, had it accurately determined the maximum statutory penalty, we remand the case for recalculation of the penalty in light of the true statutory maximum.

CONCLUSION

For the foregoing reasons, we affirm the district court's judgment except as to the amount of the civil penalty imposed on the City of New York and remand the case to the district court to recalculate that penalty.

MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF THE NEW YORK, DATED OCTOBER 4, 2000

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILLDELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

Plaintiff(s),

-against-

1:00-CV-511 (FJS/RFT)

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant(s).

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APPEARANCES	OF COUNSEL
PACE ENVIRONMENTAL LITIGATION CLINIC, INC. 78 North Broadway White Plains, New York 10603 Attorneys for Plaintiffs	**KARL S. COPLAN, ESQ.**[1]
CITY OF NEW YORK OFFICE OF CORPORATION COUNSEL 100 Church Street New York, New York 10007-2601 Attorneys for Defendants	**SUSAN C. MOON, ESQ.**

SCULLIN, Chief Judge

U.S. DISTRICT COURT – N.D. OF N.Y. FILED OCTOBER 6, 2000, LAWRENCE K. BAERMAN, CLERK-SYRACUSE

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[1] With the Court's permission, Basil Saggos, a law student, argued on Plaintiffs' behalf.

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Presently before the Court are Defendants' motions (1) to dismiss Plaintiffs' turbidity and thermal discharge claims, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction; (2) to dismiss Plaintiff's suspended solids claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim *upon* which relief can be granted; and (3) for a more definite statement pursuant to Rule 12(e) of the Federal Rules of Civil Procedure. On September 22, 2000, the Court heard oral argument on these motions and reserved decision. The following constitutes the Court's analysis and conclusions with respect to these motions.

II. BACKGROUND

On November 20, 1998, Plaintiffs mailed notice of alleged violations of the Clean Water Act ("CWA") and of Plaintiffs' intent to file suit to the Administrator of the United States Environmental Protection Agency, the New York State Department of Environmental Conservation, and to Defendants as required by Section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A). Fourteen months later, Plaintiffs filed the instant complaint. Plaintiffs brought this citizen suit seeking declaratory and injunctive relief under Section 301 of the CWA, 33 U.S.C. § 1311(a), against Defendants for allegedly violating the CWA by their unpermitted and unlawful discharge of pollutants from the Shandaken Tunnel into Esopus Creek.

Defendants operate the Shandaken Tunnel as part of the New York City Catskill Water Supply System. See Complaint at ¶ 20. The Shandaken Tunnel begins at the Schoharie Reservoir in Delaware County, passes through Green County, and into Ulster County where it discharges

into Esopus Creek. See id. at ¶ 19. When the Shandaken Tunnel is in operation, the intake pipe accepts water from the Schoharie Reservoir and adds it into the Shandaken Tunnel. The water flows through the Shandaken Tunnel and is discharged into Esopus Creek. See id. at ¶ 21. In the absence of the Shandaken Tunnel, water from the Schoharie Reservoir would not reach Esopus Creek because Esopus Creek is located in a different watershed than the Schoharie Reservoir. See id. at ¶¶ 22, 37.

The water in Esopus Creek is naturally more clear, or less turbid and lower in suspended solids, than the water of the Schoharie basin. See id. at ¶ 23. The New York State Department of Environmental Conservation ("DEC") has designated Esopus Creek, between the outlet of the Shandaken Tunnel and the inlet of the Ashokan Reservoir, as a Class A(T) stream. This classification signifies high quality water that is suitable for a trout fishery. See id. at ¶ 22. The discharge from the Shandaken Tunnel into Esopus Creek contains a high level of turbidity and suspended solids in the form of fine red clay particles. See id. at ¶¶ 27-28. The discharge from the Shandaken Tunnel periodically contains elevated temperatures that stress trout populations in Esopus Creek. See id. at ¶ 30.

The City of New York has neither applied for, nor been granted, a National Pollutant Discharge Elimination System ("NPDES") or a State Pollutant Discharge Elimination System ("SPDES") permit for its discharges into Esopus Creek. See id. at ¶ 35. Plaintiffs assert . that Defendants have violated and will continue to violate "an effluent standard or limitation" under § 505(a)(l)(A) of the CWA, 33 U.S.C. § 1365(a)(1)(A), because of their illegal and unpermitted discharge from the Shandaken Tunnel into Esopus Creek. See id. at ¶ 38.

III. DISCUSSION

A. Subject Matter Jurisdiction

The CWA authorizes a citizen to bring a suit in federal court against any person who is alleged to be in violation of "an effluent standard or limitation" as defined by the CWA. To commence a suit, however, a citizen must comply with § 1365(b), which provides, in pertinent part,

> No action may be commenced -
>
> (1) under subsection (a)(1) of this section - (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator [of the EPA], (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, . . .

33 U.S.C. § 1365(b).

The purpose of this notice requirement "'is to give [the alleged violator] an opportunity to bring itself into compliance with the Act and thus likewise render unnecessary a citizen suit.'" Atlantic States Legal Found., Inc. v. Stroh Die Casting Co., 116 *F.3d* 814, 818 (7th Cir. 1997) (quoting [Gwaltney,] 484 U.S. at 60, 108 S. Ct at 383) (other citation omitted).

In the present case, Defendants do not dispute that Plaintiffs sent them a notice letter. Rather, they claim that Plaintiffs' notice letter lacks the specificity required by the CWA and its regulations to put Defendants on notice of the violations upon which Plaintiffs intended to sue. Specifically, Defendants contend that Plaintiffs' letter failed to identify the specific standard, limitation or order alleged to have been violated and failed to list two of the

pollutants -- turbidity and thermal discharge - which, together with suspended solids, form the basis of Plaintiffs' complaint. Due to this alleged lack of specificity, Defendants argue that the notice is legally insufficient and, therefore, the Court lacks subject matter jurisdiction over Plaintiff's turbidity and thermal discharge claims.

Defendants rely upon Hallstrom v. Tillamook County, 493 U.S. 20 (1989), to support their position that this Court lacks subject matter jurisdiction over Plaintiffs' turbidity and thermal discharge claims because Plaintiffs' notice letter lacks the necessary specificity.[2] The issue before the Court in Hallstrom was whether compliance with the Resource Conservation and Recovery Act's ("RCRA") 60-day notice provision (modeled on the CWA's notice provision) was "a mandatory precondition to suit or [could] be disregarded by the district court at its discretion." Id. at 23. The Court concluded that "[u]nder a literal reading of the statute, compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit." Id. at 26. Unlike the situation here, however, the plaintiff in Hallstrom sent no notice letter prior to commencing suit. Therefore, the Court in Hallstrom had no occasion to address the sufficiency of the contents of a RCRA notice. Accordingly, Hallstrom is not dispositive of the issue before this Court.

What are dispositive, however, are the EPA's regulations which set forth the notice requirements:

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[2] There is no question that had Plaintiffs not complied with the CWA's 60-day notice requirement, the Court would have to dismiss the complaint (even if Defendants had learned about the claims in another way). Plaintiffs, however, did provide Defendants with notice. Thus, the question is whether the Court must dismiss the turbidity and thermal discharge claims because. these claims were not explicitly mentioned in Plaintiffs' notice letter.

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 135.3(a).

Defendants argue that Plaintiffs' notice letter fails to meet those requirements because (1) it fails to provide notice of the "parameters" or "types" of violations which Plaintiffs assert in their complaint; (2) it mentions neither turbidity nor thermal discharge; and (3) it fails to disclose the activities which allegedly constitute these regulatory violations.

Plaintiffs' notice letter states, in pertinent part,

> [Plaintiffs] believe that the City of New York has violated and continues to violate "an effluent standard or limitation" under section 505(a)(1)(A), by discharging pollutants from a point source without a permit in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).
>
> Based on data collected by the Catskill Delaware Natural Water Alliance, Inc., Complainants believe that the City of New York has discharged from the Shandaken

> aqueduct, and continues to discharge, pollutants in the form of Total Suspended Solids and Settleable Solids into the Esopus Creek, a class A stream, 6 NYCRR § 862.6. These violations have occurred and continue to occur every day that the Shandaken tunnel delivers water into the Esopus Creek, which has been every day that the tunnel operates for at least the past five years (the statute of limitations period under the Clean Water Act).

See Plaintiffs' Ntice Letter, attached as Exhibit "B" to the Affidavit of Susan Moon, dated May 25, 2000.[3]

Plaintiffs' notice letter clearly provides the notice required by 40 C.F.R. § 135.3(a), at least with respect to suspended and settleable solids. The only issue, therefore, is whether turbidity and thermal discharges -- which are not explicitly mentioned in the notice letter - are similar enough to suspended and settleable solids to have put Defendants on notice that these pollutants also formed the basis for Plaintiffs' complaint.

In support of their claim that turbidity and thermal discharge are inseparable from suspended solids, Plaintiffs direct the Court to the common meaning of these terms. In this regard, Plaintiffs assert that the term "suspended solids" is commonly equated with turbidity. See Plaintiffs' Memorandum of Law at 10 (citing *The American Heritage Dictionary of the English Language* (Copyright 1996, Houghton Mifflin Company) *("turbid* is defined as 'having sediment or foreign particles stirred up or suspended;

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[3] Plaintiffs' notice letter also contains the full names, addresses, and telephone numbers of all Plaintiffs.

muddy,' while the word *turbidity has* the meaning 'muddiness created by stirring up sediment or having foreign particles suspended.'"). Moreover, Plaintiffs claim that the EPA, Office of Water, on its website, states that "higher turbidity increases water temperatures because suspended particles absorb more heat." See id. Based upon these definitions, Plaintiffs conclude that "suspended solids, turbidity and thermal discharges are inseparably linked in such a way that the notice of suspended solids was sufficient to place Defendants on notice thereby satisfying its purpose." Id. at 10-11. Based upon the relationship between suspended solids (which were referenced in the notice letter) and their effect on turbidity and water temperature, the Court finds that Plaintiffs' notice letter sufficiently notified Defendants of these claims and, therefore, complies with § 135.3(a). Accordingly, the Court denies Defendants' motion to dismiss Plaintiffs' turbidity and thermal discharge claims for lack of subject matter jurisdiction.

B. Defendants' Motion to Dismiss for Failure to State a Claim

To state a claim for the improper discharge of a pollutant without an NPDES permit pursuant to § 301 of the CWA, "five elements must be present: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982). Defendants contend that Plaintiffs have failed to allege sufficient facts to state a claim that the discharge of suspended sediments into Esopus Creek is an illegal and unpermitted discharge within the meaning of the CWA. Specifically, Defendants contend that Plaintiffs' failure to state in their complaint that suspended sediments are a "pollutant" is fatal to their claim.

A careful reading of Plaintiffs' complaint, however, demonstrates that Plaintiffs have alleged

sufficient facts from which it can be inferred that suspended sediments are a pollutant. In this regard, Plaintiffs' complaint states that "Defendant's discharges of suspended solids, turbidity, and heat into the Esopus Creek are illegal and unpermitted discharges within the meaning of section 301(a) of the Clean Water Act, 33 U.S,C. § 1311(a)." See Complaint at 39. Since a discharge is illegal only if the discharged substance is a pollutant, it can reasonably be inferred from the complaint that Plaintiffs are alleging that suspended solids are a pollutant within the meaning of the CWA. Moreover, because in addressing a motion to dismiss the Court must draw all reasonable inferences in Plaintiffs' favor, the Court concludes that Plaintiffs have sufficiently alleged that suspended solids are a pollutant for purposes of their CWA claims.

More troubling, and ultimately dispositive of this motion, is Defendants' contention that Plaintiffs have failed to allege that the discharge of suspended solids, turbidity and heat into Esopus Creek is "an addition" of pollutants "from" a point source. According to Defendants, an "addition" occurs only if "the point source itself physically introduces a pollutant into water from the outside world." See Defendants' Reply Memorandum of Law at 2 (quoting Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165, 174-75 (D.C. Cir. 1982)). Therefore, Defendants argue that Plaintiffs' allegation that Defendants' redirection of water, which already contains suspended solids, from one body of water to another constitutes a point source discharge is not sufficient to establish an "addition" for purposes of the CWA. See Defendants' Memorandum of Law at 14.

In response, Plaintiffs assert that Defendants are adding pollutants in the form of suspended solids, turbidity and heat from the Schoharie Reservoir through the Shandaken Tunnel into Esopus Creek. They claim that "[t]his type of 'addition' is precisely what the Clean Water Act is intended to prohibit, since it has turned a renowned

trout stream into a water body that is now unsuitable for trout fishing." See Plaintiffs' *Memorandum of Law at* 13-14. Therefore, Plaintiffs assert that "in order to continue the discharge of suspended solids, turbidity and elevated temperatures into the Esopus Creek within the limits of the law, [Defendants] must be required to apply for and be granted a NPDES/SPDES permit," as required by § 402 of the CWA, 33 U.S.C. § 1342. See id. at 14.[4]

The only case that arguably supports Plaintiffs' position is Dubois v. United States Dep't of Agric., 102 F.3d 1273 (1996). Plaintiffs rely upon Dubois for the proposition that Defendants' diversion of water is an "addition" because the Schoharie Reservoir and Esopus Creek are two separate bodies of water. In response, Defendants rely upon National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), and National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988), to support their argument that the mere diversion of water without more does not constitute an "addition."

Although none of these cases are directly on point, they offer some insight into factors courts have considered to determine what constitutes an "addition" for purposes of the CWA. In Dubois, the Loon Mountain Recreation Corporation drew water from Loon Pond and the Pemigewasset River for its snowmaking operations. After it had used the water to pressurize and prevent freezing in its snowmaking equipment, it discharged the water into Loon Pond.

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[4] Plaintiffs also contend that they have adequately alleged the "addition" of a pollutant because water from the Schoharie Reservoir would not reach Esopus Creek in the absence of the Shandaken Tunnel and the water of Esopus Creek is naturally more clear, or less turbid and lower in total suspended solids, than the water of the Schoharie basin. See Plaintiffs' Memorandum of Law at 18.

Based upon these facts, the First Circuit concluded that the diversion of the river water with its pollutants into Loon Pond (which was not connected to the river) was an addition which required a permit under the CWA. In reaching its decision, the First Circuit specifically distinguished Gorsuch, which it characterized as involving a dam that merely accumulated water and Consumers Power Co., which involved a pump storage facility that stored water from one source in a different place, from the situation in Dubois in which water was moved from one flowing water body into another stationary, cold body of water. See Dubois, 102 F.3d at 1299.

Unlike Dubois, the court in Gorsuch concluded that the mere diversion of water did not constitute an "addition" for purposes of the CWA. In that case, the plaintiff argued (similarly to Plaintiffs in this case) that any adverse change in the quality of reservoir water from its natural state involved a "pollutant" and that release of polluted water through a dam into a downstream river constituted the "addition" of a pollutant to navigable waters "from" a point source. To the contrary, the EPA argued that for an addition of a pollutant from a point source to occur, the point source must introduce the pollutant into navigable water from the outside world. See Gorsuch, 693 F.2d at 174-75. According to the EPA, dam-caused pollution, in contrast, merely passed through the dam from one body of navigable water (the reservoir) into another (the downstream river). In addition, although the EPA conceded that all adverse water quality changes are "pollution" - broadly defined in § 1362(19) as "'the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water -- [the] EPA argue[d] that low dissolved oxygen, cold, and supersaturation were not included in the narrower statutory term 'pollutant,' defined in § 502(6), 33 U.S.C. § 1362(6) as: 'dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge,

munitions, *chemical* wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into the water.' Id. at 165 (footnote omitted).

The court in Gorsuch recognized that the CWA did not define what constitutes an "addition of a pollutant." It also recognized that Congress had not expressly addressed whether the EPA should have discretion to define "addition." The court noted, however, that Congress had given the EPA the reasonable discretion to define "point source" and "pollutant" Therefore, the court concluded that it was "likely that Congress would have given EPA similar discretion to define `addition' had it expected the meaning of the term to be disputed." Id. at 175. Based upon its finding that the EPA's interpretation of "addition" was reasonable, the court concluded that because the EPA had concluded that the dam did not "add" pollutants into the downstream river, its interpretation was entitled to great deference and must be upheld. See id. at 166-68, 175.

The Sixth Circuit in Consumers Power Co. also found no "addition" of a pollutant based upon the facts before it. In that case, the district court had concluded that the defendant's hydro-electric facility's release of turbine generating water containing entrained fish into Lake Michigan required an NPDES permit The Sixth Circuit reversed, finding that the facility's movement of pollutants already in the water was not an "addition" of pollutants to navigable waters of the United States.

Relying upon Gorsuch, the Sixth Circuit concluded that "[t]o the extent that no more has been shown than that unclean water flows out of the dam, Congress clearly displayed an intention to exempt dams from the Clean Water Act." Consumers Power Co., 862 F.2d at 586. The court distinguished the case before it, in which a facility

merely transmitted water coming into it, from the situation in which the dam itself added pollutants to the water and, therefore, would be subject to the NPDES permits system. The court also noted that even if the facility had released heat into the water, the result would have been the same. See id. ("Indeed, it is fair to say that the release of water containing heat could be quite harmful to the fishery resources inhabiting a lake, yet the harmful character still would not make the water and its contents an `addition' of pollutants into navigable waters of the United States.").

In every case other than Dubois, where a court has found an "addition" of a pollutant, more has been involved than the simple diversion of water from one navigable body of water to another. See, e.g. Committee to Save Mokelumne River v. East Bay Mun. Utility Dist., 13 F.3d 305 (9th Cir. 1993) (court distinguished Gorsuch and Consumer Power Co. because the facility did not merely pass pollution from one body of navigable water to another. Rather, the source of pollution was "surface runoff that is collected or channeled by" the defendants from an abandoned mine site); United States v. Law, 979 F.2d 977 (4th Cir. 1992) (court distinguished Gorsuch and Consumer Power C., because the defendant's water treatment system collected runoff and leachate subject to an NPDES permit and the system was not part of the "waters of the United States"); Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088 (S.D.N.Y. 1990), aff'd without opinion, 940 F.2d 649 (2d Cir 1991) (court held that the City had violated the CWA by discharging chlorine and alum floc into the reservoir without first obtaining a pollution emissions permit).

In light of the EPA's interpretation of what constitutes an "addition" for purposes of the CWA (which the Dubois court did not consider) and the lack of any evidence that Defendants added anything to the water in the Reservoir before releasing it through the Shandaken tunnel,

the Court concludes that Plaintiffs have failed to establish a necessary element of their claim; i.e., that Defendants' diversion of water from the Schoharie Reservoir to Esopus Creek through the Shandaken tunnel constitutes an "addition" of pollutants "from" a point source. Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' complaint for failure to state a claim upon which relief can be granted.

C. Defendants' motion for a more definite statement

In light of the Court's decision to grant Defendants' motion to dismiss Plaintiffs' complaint pursuant to Rule 12(bX6) for failure to state a claim, the Court denies Defendants' motion for a more definite statement as moot.

IV. CONCLUSION

After carefully considering the file in this matter, the oral arguments and submissions of the parties and the applicable law, and for the reasons stated herein, it is hereby

ORDERED that Defendants' motion to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction is **DENIED**; and it is further

ORDERED that Defendants' motion to dismiss Plaintiffs' turbidity and thermal discharge claims for failure to state a claim is **GRANTED**; and it is further

ORDERED that Defendants' motion for a more definite statement is **DENIED** as moot; and it is further

ORDERED that the Clerk of the Court enter judgment in favor of Defendants and against Plaintiffs and close this case.

IT IS SO ORDERED.

Dated: October 4 , 2000 Syracuse, New York

s/_____
Frederick J. Scullin, Jr.
Chief United States District Judge

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DATED JANUARY 19, 2001

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

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1:00-CV-511 (FJS/RFT)

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APPEARANCES	OF COUNSEL
PACE ENVIRONMENTAL LITIGATION CLINIC, INC. 78 North Broadway White Plains, New York	**KARL S. COPLAN, ESQ.**

10603 Attorneys for Plaintiffs	
CITY OF NEW YORK OFFICE OF CORPORATION COUNSEL 100 Church Street New York, New York 10007-2601 Attorneys for Defendants	**SUSAN C. MOON, ESQ**
SCULLIN, Chief Judge	

ORDER

I. INTRODUCTION

After hearing oral argument on Defendants' motion on September 22, 2000, the Court issued a Memorandum-Decision and Order, dated October 6, 2000, in which the Court, among other things, granted Defendants' motion to dismiss Plaintiffs; complaint for failure to state a claim upon which relief could be granted.

Plaintiffs now move for reconsideration on the grounds that "the Court committed clear error on the level of deference appropriate to the EPA interpretation of the

words 'addition of a pollutant' for the purpose of the Clean Water Act, as controlling Supreme Court jurisprudence was overlooked." See Plaintiffs' Memorandum of Law at 3. Specifically, Plaintiffs argue that, in light of the Supreme Court's recent decision in Christensen v. Harris County, 120 S. Ct. 1655 (2000), the Court gave too much deference to the EPA's interpretation of what constitutes an "addition" for purpose of the Clean Water Act ("CWA").

II. DISCUSSION

A. Standard of Review

Generally, the courts in this district recognize only three possible bases *upon which* motions for reconsideration may be granted: "'(1) an intervening change in controlling law, (2) the availability of new evidence not previously available, or (3) the need to correct a clear error of law or prevent manifest injustice.'" Sumner v. McCall, 103 F. Supp. 2d 555, 558 (N.D.N.Y. 2000) (quoting In re C-TC 9th Ave. Partnership, 182 B.R. 1, 3 (N.D.N.Y. 1995) (McAvoy, C.J.)). Parties who base their

motion on the third ground have a demanding standard to meet. Under the "clear error" test, the court's previous decision will be disregarded only when the court has a "clear conviction of error" with respect to a point of law on which it based its previous decision. See Fogel v. Chestnutt, 668 F.2d 100, 109 (2d Cir. 1981). Thus, a party considering a motion for reconsideration should evaluate "'whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant.'" Sumner, 103 F. Supp. 2d at 559 quoting In re C-TC 9th Ave, Partnership, 182 B.R. at 3).

As discussed below, Plaintiffs have not demonstrated that the Court committed a clear error of law in reaching its conclusion that Plaintiffs had failed to establish that Defendants' actions constituted an "addition" for purposes of the CWA. Therefore, the Court denies their motion for reconsideration.

B. "Clear Error" Standard

Plaintiffs claim that in light of the Supreme Court's

decision in Christensen, the Court committed clear error by affording too much deference to the EPA's interpretation of what constitutes an "addition" for purposes of the CWA. In Christensen, the Court held that agency interpretations such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines, do not warrant the high level of deference afforded by Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Leg Christensen, 120 S. Ct. at 1662. Rather, the Court stated that "interpretations contained in formats such as opinion letters are 'entitled to respect,' . . ., but only to the extent that those interpretations have the 'power to persuade.'" Id. at 1663 (internal quotation and citation omitted)

Based upon this statement in Christensen, Plaintiffs argue that the EPA's interpretation of "addition" in National Wildlife Fed'n v. Gorsuch. 693 F.2d 156 (D.C. Cir. 1982), is entitled to little deference because that interpretation was never subjected to adjudication or notice

and comment rulemaking. See Plaintiffs' Memorandum of Law at 6. Moreover, Plaintiffs assert that since Gorsuch, is factually distinguishable from this case, the EPA's interpretation in Gorsuch should be given even less deference. See id. Defendants oppose Plaintiffs' motion for reconsideration on several grounds. First, Defendants argue that the Court's dismissal of Plaintiffs' complaint was based upon prior case law, not on undue deference to the EPA's interpretation of the Clean Water Act. See Defendants' Memorandum of Law at 5. Second, Defendants assert that the Court should not excuse Plaintiffs' failure to raise this argument in opposition to Defendants' motion to dismiss. See id. at 6-7. Finally, Defendants contend that there is no reasonable expectation that reconsideration of the Court's decision in light of Christensen would alter the conclusion the Court has already reached. See id. at 7-8.

Plaintiffs' argument, in essence, is premised upon their conclusion that the Court relied entirely upon the

EPA's interpretation of the term "addition" in determining that Defendants' diversion of water from the Schoharie Reservoir to Esopus Creek through the Shandaken tunnel did not constitute an "addition" of pollutants "from" a point source as required for a violation of the CWA. See Memorandum-Decision and Order at 13. Plaintiffs, however, place too much emphasis on part of one sentence in the Court's Memorandum-Decision and Order. See id. When this sentence is read in its entirety, it is clear that the Court did not rely entirely upon the EPA's interpretation of the term "addition" as a basis for its conclusion that Defendants' actions did not constitute an "addition." The sentence reads in full:

> In light of the EPA's interpretation of what constitutes an 'addition' for purposes of the CWA (which the Dubois court did not consider) and the lack of any evidence that Defendants added anything to the water in the Reservoir before releasing it through the Shandaken tunnel, the Court concludes that Plaintiffs have failed to establish a necessary element of their claim; i.e., that Defendants' diversion of water from the Schoharie Reservoir to Esopus Creek through the

> Shandaken tunnel constitutes an 'addition' of pollutants 'from' a point source.

See id.

Moreover, this statement appeared at the very end of the Court's decision and followed the Court's analysis of the decisions in Gorsuch and National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cit. 1988), which it found persuasive, and after it had distinguished Dubois v. United States Dep't of Agric., 102 F.3d 1273 (1996), the case upon which Plaintiffs relied to support their argument that Defendants' diversion of water constituted an "addition" for purposes of the CWA.

When the Court's reference to the EPA's interpretation of the term "addition" is read in the context of the Court's entire opinion, it is apparent that the Court gave no more deference to the EPA's interpretation of the term "addition" than it was entitled to under Christensen; i.e., the Court relied upon the EPA's interpretation only to the extent that it had the power to persuade. As set forth in its

discussion, the Court found the reasoning in Gorsuch and Consumers Power Co., to be persuasive in reaching its conclusion that Plaintiffs had failed to establish that Defendants' actions constituted an "addition" for purposes of the CWA and, thus, had failed to state a claim upon which relief could be granted.

Plaintiffs obviously disagree with the Court's decision and find Dubois more persuasive than Gorsuch and Consumers Power Co. However, this disagreement constitutes nothing more than a difference of opinion and does not rise to the level of a clear error of law which would warrant granting Plaintiffs' motion for reconsideration.

III. CONCLUSION

After carefully considering the file *in this* matter, the submissions of the parties and the relevant law, and for the reasons stated herein, it is hereby

ORDERED that Plaintiffs' motion for reconsideration is **DENIED**.

IT IS SO ORDERED.

Dated: January 19, 2001
Syracuse, New York

s/_____
Frederick J. Scullin, Jr.
Chief United State District Judge

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 3, 2001

(Reported at 273 F.3d 481)

REPRODUCED FOLLOWING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of October, two thousand and one.

BEFORE: Hon. John M. Walker, Jr., Chief Judge

Hon. Robert A. Katzmann.
Hon. Richard D. Cudahy*
Circuit Judges.

Docket No. 00-9447

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTMEN'S CLUBS OF ULSTER COUNTY. INC. and RIVERKEEPER, INC.,

Plaintiffs-Appellants,

V.

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Defendants-Appellees.

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* The Honorable Richard D. Cudahy of United States Court of Appeals for the Seventh Circuit, sitting by designation.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is REVERSED in part, AFFIRMED in part and REMANDED for further proceedings in accordance with the opinion of this Court. Costs are awarded to appellants.

FOR THE COURT,
ROSEANN B. MACKECHNIE, Clerk
by s/_____
Arthur M. Heller,
Administrative Attorney

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2000

(Argued May 25, 2001 Decided: October 23, 2001)

Docket Nos. 00-9447

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC. and RIVERKEEPER, INC.,

Plaintiffs-Appellants,

— v. —

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Defendants- Appellees,

Before:

WALKER, Chief Judge,
KATZMANN and CUDAHY, * Circuit Judges.

Plaintiff environmental organizations appeal from an October 6, 2000 order of the United States District Court for the Northern District of New York (Frederick J. Scullin, Jr., *Chief District Judge*) granting defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6).

Reversed in part, affirmed in part, and remanded.

KARL S. COPLAN, ESQ., Pace Environmental Litigation Clinic, Inc. (Basil B. Seggos, on the brief), White Plains, New York, *for Appellants.*

ELLEN S. RAVITCH, ESQ., Office of the Corporation Counsel of the City of New York (Michael D. Hess, Stephen J. McGrath, Hillary Meltzer, and William S. Plache, on the brief), New York, New York, *for Appellees.*

JOHN M. WALKER, JR., *Chief Judge*:

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* The Honorable Richard D. Cuday of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

Plaintiff environmental organizations Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., and Riverkeeper, Inc. (collectively "Catskill") appeal from an October 6, 2000 order of the United States District Court for the Northern District of New York (Frederick J. Scullin, Jr., *Chief District Judge*) granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6) made by defendants City of New York, New York City Department of Environmental Protection, and Joel A. Miele. Sr., Commissioner of the Department of Environmental Protection (collectively "New York City" or "the City"). We conclude that some of Catskill's claims should not have been dismissed and those that were properly dismissed should have been dismissed without prejudice. Accordingly, we reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

Since before World War II, New York City has operated Schoharie Dam and Reservoir in the Catskill Mountains, to provide drinking water for New York City. Water is diverted south from the Schoharie Reservoir ("the Reservoir") through the Shandaken Tunnel ("the Tunnel") for several miles and released into Esopus Creek ("the Creek"), which in turn empties into Ashokan Reservoir. The transfer of water from the Reservoir to Esopus Creek and Ashokan Reservoir facilitates its delivery to New York City for use as drinking water.

Absent the tunnel, water leaving the Reservoir would flow north in Schoharie Creek, join the Mohawk River, and flow into the Hudson River. Water from Esopus Creek, on the other hand, makes its way southeast to the Hudson by

way of Ashokan Reservoir. Schoharie Reservoir and Esopus Creek are hydrologically connected only insofar as both are tributaries of the Hudson. Under natural conditions, water from the Schoharie Reservoir would never reach Esopus Creek.

Plaintiffs-appellants primarily represent recreational users of Esopus Creek. On November 20, 1998, Catskill sent a letter to the City, the United States Environmental Protection Agency ("EPA"), and the New York State Department of Conservation ("NYSDEC"), indicating Catskill's intention to file suit in district court under the federal Clean Water Act ("CWA," "the Act"), 33 U.S.C. § 1251 et seq. The Act permits aggrieved parties to bring civil action to enforce certain of the statute's requirements against violators. *See* 33 U.S.C. § 1365 ("Citizen suits.").

On March 31, 2000, Catskill filed a complaint in district court alleging that the City, as owner and owner and operator of the Schoharie Reservoir and Shandaken Tunnel, was is violation of 33 U.S.C. § 1311(a), which prohibits "the discharge of any pollutant" unless those discharges are conducted in accordance with a duly issued discharge permit. 33 U.S.C. § 1311(a) (citing permit requirement in 33 U.S.C. § 1342). Catskill alleged that the Tunnel discharges pollutants in the form of "suspended solids," "turbidity," and heat into Esopus Creek. They alleged that the suspended solids and turbidity are the result of earth-disturbing activities within the Reservoir's watershed that produce fine, red-clay sediments in the Reservoir. They further alleged that the discharges cause the Creek to violate state water quality standards for turbidity and temperature. Esopus Creek, Catskill contended, is naturally clearer and cooler than the water entering it from the Tunnel and supports "one of the premier trout fishing streams in the Catskill Region."

The City responded by moving under Fed. R. Civ. P. 12(b)(1) that the case be dismissed for want of jurisdiction because Catskill's notice-of-intent-to-sue letter ("NOI letter") was inadequate, and a proper NOI letter, they argued, is a jurisdictional prerequisite for a CWA citizen suit. The City also moved pursuant to Fed. R. Civ. P. 12(b)(6) that the case be dismissed because, although the City admits that it lacks a permit to discharge into Esopus Creek, it need not obtain one because its releases do not constitute "discharges" as defined by the CWA.

The district court denied the City's Rule 12(b)(l) motion, concluding that Catskill's NOI letter comported with the requirements of the Act and EPA regulations, but granted Rule 12(b)(6) motion. It found that, as a matter of law, the Reservoir and Tunnel did not effect an "addition" of a pollutant to the Creek, as required to trigger the CWA's permit requirement. *See* 33 U.S.C. § 1362(12) (defining "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source"). Catskill appealed.

DISCUSSION

The City makes two arguments in support of the district court's dismissal. It first argues that the district court and this court lack subject matter jurisdiction over the case because Catskill's NOI letter, required by the CWA's citizen suit pro-vision, was inadequate and that a proper NOI letter is a pre-requisite to the court's subject-matter jurisdiction. Second, the City reiterates its successful argument in the district court, that the complaint failed to state a claim, because Shandaken Tunnel does not effect an "addition" of a pollutant, as required to constitute a "discharge" for which a permit must be sought.

We agree with the City that the NOI letter did not provide adequate notice of Catskill's eventual claim

regarding thermal discharges, but find the letter adequate to notify the City of the balance of Catskill's claims. The district court should have dismissed the thermal discharge claims without prejudice, however, and we therefore vacate the judgment with respect to those claims and remand with direction to dismiss them without prejudice to refiling after submission of a conforming NOI letter and after the 60-day delay required by the CWA. We also conclude that the district court erred in dismissing Catskill's complaint on the theory that Shandaken Tunnel does not "discharge" pollutants into Esopus Creek. We therefore reverse the judgment on the remaining claims and remand the case for further proceedings.

I. The Statutory Framework

We begin with an overview of the regulatory regime. The CWA's primary function is to regulate the discharge of pollutants into navigable waters. Although the Act contains the lofty goal of eliminating water pollutant discharges altogether, *see* 33 U.S.C. § 1251(a)(1), the regulatory regime it creates requires principally that discharges be regulated by permit, not prohibited outright. The Act mandates that "the discharge of any pollutant by any person shall be unlawful," 33 U.S.C. § 1311(a), "[e]xcept as in compliance" with other provisions of the statute, one of which establishes a permitting program, the "National Pollutant Discharge Elimination System" ("NPDES"), 33 U.S.C. § 1342. Section 1342 in turn provides for the issuance of discharge permits ("NPDES permits") that allow the holder to discharge pollutants at levels below thresholds incorporated in the permit. 33 U.S.C. § 1342(a); *see also* 40 C.F.R. § 122.1 et seq. In New York, the NPDES program is administered by NYSDEC and referred to as the State Pollution Discharge Elimination System ("SPDES"). *See* 33 U.S.C. § 1342(b) (authorizing state implementation of the NPDES program); N.Y. Envtl. Conserv. Law §§ 17-0105(13), 17-0701.

In the instant case, Catskill alleges that the City has been violating the CWA's unpermitted discharge prohibition by discharging water containing pollutants from Shandaken Tunnel into Esopus Creek without first obtaining an NPDES permit. The Act defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The Act defines "pollutant," "navigable waters," and "point source," 33 U.S.C. § 1362(6), (7), and (14) but the crux of this appeal is the meaning of "addition," which the Act does not define.

In addition to providing for enforcement by state agencies and the EPA, the CWA allows private parties to enforce its mandates, including the prohibition of unpermitted discharges in § 1311(a), against alleged violators in so-called "citizen suits." *See* 33 U.S.C. § 1365(a)(1), (f). An aggrieved plaintiff may bring a civil action for specific relief, such as the imposition of particular compliance measures, or civil penalties payable to the treasury, *see* 33 U.S.C. § 1365(a), and may recover attorney's fees, *see* 33 U.S.C. § 1365(d). At least 60 days prior to filing, however, the prospective plaintiff must provide notice of its claims to the potential defendant, the EPA, and the state in which the violations allegedly occurred. *See* 33 U.S.C. § 1365(b)(1)(A). If a competent state or federal enforcement agency brings a civil enforcement action against the defendant prior to the citizen complaints being filed, or an administrative enforcement proceeding prior to the plaintiff's NOI letter, the citizen suit is pre-empted and must be dismissed. *See* 33 U.S.C. §§ 1319(g)(6), 1365(b)(1)(B).

II. Catskill's Notice of Intent to Sue

The City claims that Catskill's NOI letter was inadequate because, while it was provided in a timely fashion to the proper parties, the letter failed to give the

City adequate notice of the claims that Catskill intended to bring. Catskill's complaint as filed alleged discharges of "a high l[illegible] of turbidity," "suspended solids," and "elevated tempe[illegible]es." Yet the NOI letter stated only that the City has discharged "pollutants in the form of Total Suspended Solids and Settleable Solids into the Esopus Creek." The City argues that by failing to provide notice of the claims of turbidity and thermal discharges ultimately alleged in the complaint, the NOI letter was fatally detective, requiring the suit to be dismissed. Although the district court did not rely on this theory in dismissing the complaint, we may affirm on a basis not relied on by the district court. *See Name.Space, Inc. v. Network Solutions, Inc.*, 202. F.3d 573, 584 (2d Cir. 2000). We conclude that the NOI letter failed to notify the City of Catskill's thermal discharge claims, but that fact does not invalidate Catskill's complaint in its entirety. Accordingly, we hold that those claims were properly dismissed.

The CWA does not describe the content of the required notice. but directs that "[n]otice . . . shall be given in such manner as the Administrator shall prescribe by regulation." 33 U.S.C. § 1365(b). The EPA has adopted such regulations. which mandate, inter alia, as follows:

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 135.3(a). In the past, we have refused to "allow form to prevail over substance" in considering the content required of an NOI letter, and have looked instead to what the particular notice given may reasonably be expected to accomplish. *Dague v. City of Bur*lington. 935 F.2d 1343, 1354 (2d Cir. 1991), rev'd in part on other grounds, 505 U.S. 557 (1992).

The City contends that the EPA regulations require a potential plaintiff to include in an NOI letter each separate pollutant that will be alleged in a subsequent complaint as the. basis of a violation of the Act. At least one circuit has adopted such a rule. See Pub. Interest Research Group v. Hercules, 50 F.3d 1239, 1248 (3d Cir. 1995). On this theory, for example, a plaintiff could not bring suit for discharges of mercury, lead, and copper if the NOI letter alleged violations based only on discharges of copper. In that case, the claims of copper violations would stand, but the claims based on mercury and lead discharges would need to be dismissed. We agree with the City that such a rule logically follows from the regulatory scheme and therefore adopt it.

The EPA regulations require that an NOI letter "include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, [and] the activity alleged to constitute a violation." 40 C.F.R. § 135.3(a). We believe that to be "sufficient," the information provided must include the pollutant alleged to be the basis of a violation subsequently alleged in the complaint.

Because each discharge of a pollutant represents a distinct violation of the Act, *see* 33 U.S.C. § 1311(a) ("the discharge of any pollutant . . . shall be unlawful"); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1138 n.19 (11th Cir. 1990), identification in an NOI letter of a pollutant allegedly discharged is essential to

provide adequate notice of the alleged violation. Discharges of mercury and lead, for instance, could he distinct violations, each subject to penalties of up to $25,000 per day. *See* 33 U.S.C.§§ 1319(d), 1365(a). To provide adequate notice of each violation that will be targeted in the citizen suit, the NOI letter must differentiate pollutants from nonpollutants and one pollutant from another. The rationale for such a rule is most apparent in the context of a suit alleging discharges in excess of NPDES permit limitations, in which the defendant may he discharging some pollutants lawfully and others unlawfully. To enable the defendant to identify each violation that will be alleged, then, the NOI letter must specify each pollutant unlawfully discharged that will be alleged in a subsequent complaint. The principle applies equally where, as here, the defendant has failed altogether to obtain a permit. To state a claim based on unpermitted discharges, the plaintiff must allege some pollutant that was discharged without a permit. It follows, then, that to the extent the plaintiff intends to prosecute multiple violations involving multiple pollutants, each pollutant that will be the basis of such a claim must be set forth in the NOI letter.

The policies underlying the NOI requirement are furthered by this rule The notice and 60-day delay requirements allow a potential defendant to identify its own violations and bring itself into compliance voluntarily, thus making a costly lawsuit unnecessary. *See Hallstrom v. Tillamlook County*, 493 U.S. 20, 29-30 (1989); *Dague*, 935 F.2d at 1351; *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987) (holding that if the defendant ceases its violations prior to the filing of the complaint, the action is barred). Specific knowledge of the pollutants allegedly discharged unlawfully makes it easier for the defendant to promptly rectify the problem. *Cf. Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*,

116 F.3d 814, 819-20 (7th Cir. 1997) ("In practical terms, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit. . . . The key to notice is to give the accused company the opportunity to correct the problem.").

The notice and delay requirements are also designed to allow the enforcer of first resort, the EPA or the appropriate state agency, to bring its own enforcement action, *see Hallstrom*, 493 U.S. at 29, which would preempt the citizen lawsuit, *see* 33 U.S.C. § 1365(b)(1)(B). Inclusion of each pollutant forming the basis of a alleged violation better allows enforcement agencies to identify and prosecute a potential defendant's violations, giving effect to Congress's intention that citizen enforcers supplement, not suppl*ant, public enforcement. See id. (citing Gwaltney, 484 U.S. at 60).*

Accordingly, we hold that an NOI letter must identify with reasonable specificity each pollutant that the defendant is alleged to have discharged unlawfully. Failure to do so will justify a district court's dismissing claims based on pollutants not properly noticed.

Turning to the case at hand, we conclude that Catskill's NOI letter adequately notified the City of some but not all of the violations subsequently alleged in the complaint. The district court found, and Catskill argues on appeal, that inclusion of "suspended solids" and "settleable solids" was sufficient to notify the City of Catskill's claims of turbidity and thermal discharges, because of the logical and empirical associations between suspended solids on the one hand and turbidity and thermal discharges on the other. We agree with respect to Catskill's claims of turbidity discharges, but not with respect to thermal discharges.

Turbid water, by definition, is water carrying high levels of solids in suspension. The presence of elevated levels of suspended solids inevitably produces turbidity. "Turbid" is defined as "having the lees or sediment disturbed: thick or opaque with matter in suspension." *Webster's Third New International Dictionary* 2464 (1981). Water cannot be turbid without suspended solids, and some level of turbidity is inherent where suspended solids are present. Because each logically depends on the other, notice of discharges of suspended solids is sufficient to notify of an eventual claim based on discharges of "turbidity."

On the other hand, the relationship between suspended solids and temperature is one of association, not identify. To be sure, increased turbidity often produces increased water temperature. Particles suspended in water absorb heat, raising the temperature of the water. But the presence of suspended solids does not inevitably raise water temperature. The effect of suspended solids on temperature depends on a third variable, radiant heat, usually in the form of sunlight. Increased turbidity in a cold, dark place may not affect the temperature of the water at all, or may do so only infinitesimally, because no source of radiant heat is present. As a result, unlike suspended solids and turbidity, there is no necessary relationship between suspended solids and increased temperature. The relationship is only one of frequent association under ordinary circumstances.

Accordingly, to be sufficient, the allegations in an NOI letter must suggest that these ordinary circumstances were also prevalent. Where alleged circumstances indicate that suspended solids and increased temperature are very likely to be associated, notice of suspended solids may be sufficient to notify a reasonable person of a thermal discharge claim. In the instant case, Catskill's NOI letter does not state that such circumstances were prevalent.

For the foregoing reasons, we hold that Catskill's claims of unpermitted thermal discharges were properly dismissed under Rule 12(b)(6). However, those claims should have been dismissed without prejudice. Thus we vacate so much of the judgment as dismissed Catskill's thermal discharge claims with prejudice and remand those claims with direction that they be dismissed without prejudice to refilling after full compliance with 33 U.S.C. 1365(b)(1)(A).

III Interbasin Transfer as a "Release" Under the CWA

As we have noted, the CWA prohibits, unless otherwise allowed by permit, "the discharge of any pollutant," 33 U.S.C. 1311(a), which the Act defines to mean "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12). The statute does not define "addition." The City argues that the release of water from Schoharie Reservoir into Esopus Creek is not an "addition," citing *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), both of which accorded substantial deference to the EPA's position that the CWA's discharge permit requirement does not apply to discharges from dams. Catskill counters that the *Gorsuch* and *Consumers Power* courts accorded unjustified deference to the EPA's interpretation of "addition," that the cases are distinguishable on their facts, and that the City's conduct here qualifies as an "addition" under the plain meaning of that word. We agree with Catskill and accordingly reverse the district court and remand for further proceedings on Catskill's remaining claims.

A. The EPA's Position and the Proper Standard of Deference

In several policy statements made in opinion letters and reports to Congress in the 1980s and 1980s, the EPA took the position that dam releases should not be considered "discharges" under the CWA and thus NPDES permits would not be required for those releases.[1] *See Gorsuch*, 693 F.2d at 167-69. This position was never formalized in a notice-and-comment rulemaking or formal adjudication under the Administrative Procedure Act, 5 U.S.C. §§ 553, 554, although the EPA subsequently reiterated its position in the *Gorsuch* and *Consumers Power* cases, as a defendant and amicus curiae, respectively. *See Consumers Power*, 862 F.2d at 583; *Gorsuch*, 693 F.2d at 165. Both courts rested their decisions on the conclusion that the EPA position deserved substantial deference and was reasonable. Given subsequent Supreme Court decisions governing judicial deference to federal agencies' constructions of the statutes that they implement, we hold that the EPA position is due less deference than that accorded it by the *Gorsuch* and *Consumers Power* courts.

In 1982, in *Gorsuch*, the District of Columbia Circuit deferred to the EPA's position that dam releases wer not "additions" under the CWA, which it upheld as a reasonable construction of the statute. The *Gorsuch* plaintiffs had sued the EPA under 33 U.S.C. § 1365(a)(2), seeking a declaration that the EPA had a nondiscretionary duty to require NPDES permits from dam operators. After an extensive exegesis of the CWA's statutory text, structure, and legislative history, the court concluded that the EPA could reasonably conclude that dam releases were

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[1] The original documents in which the EPA staked out its position were not included in the filings before this court and were not published in the usual sources of administrative law, the *Code of Federal Regulations* and the *Federal Register*. We accordingly base our discussion of the EPA's position on that included in the District of Columbia Circuit's comprehensive opinion in *Gorsuch*.

not "additions." *See* 693 F.2d at 170-83. Notwithstanding the court's extensive investigation of legislative intent, its relied ultimately on deference to the agency:

> [W]e emphasize the narrowness of our decision. It is not our function to decide whether EPA's interpretation . . . is the best one or even whether it is more reasonable than the Wildlife Federation's interpretation. We hold merely that EPA's interpretation is reasonable, not inconsistent with congressional intent, and entitled to great deference; therefore, it must be upheld.

693 F.2d at 183. In 1988, the Sixth Circuit reached the same conclusion. *See* Consumers *Power*, 862 F.2d at 584-87.

If the EPA's position had been adopted in a rulemaking or other formal proceeding, deference of the sort applied by the *Gorsuch* and *Consumers Power* courts might be appropriate. Instead, the EPA's position is based on a series of informal policy statements made and consistent litigation positions taken by the EPA over the years, primarily in the 1970s and 1980s. Recent Supreme Court cases emphasize that such agency statements do not deserve broad deference of the sort accorded by the *Gorsuch* and *Consumers Power* courts.[2] *See United States v. Mead Corp.*, 121 S. Ct. 2164 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000). In *Christensen*, the Supreme Court held that "[i]nterpretations such as those in opinion letters – like interpretations contained in policy

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[2] *Consumers Power* expressly applied the standard of deference elaborated in *Chevron U.S.. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See* 862 F.2d at 584-85. *Gorsuch*, which predated *Chevron*, applied essentially the same degree of deference. *See* 693 F.2d at 166-67.

statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." 529 U.S. at 587. "Instead," the Court continued, "interpretations contained in formats such as opinion letters are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" *Id.* (citation omitted). The Court consequently held that an opinion letter by the Department of Labor deserved only this form of limited deference in its interpretation of a provision of the Fair Labor Standards Act. *See id.*

Like positions taken by the Department of Labor in its opinion letter in *Christensen*, the EPA position on dam discharges has never been articulated in circumstances that would give it the "force of law." *Gorsuch* describes only a series of letters and several presentations for Congress in reports and testimony that outlined the EPA's position. *See Gorsuch*, 693 F.2d at 167-69. None of these sources come close to the sort of formal, binding articulation of an agency's views that would justify Chevron deference after *Christensen*. That the EPA later relied on its position in litigation does not alter our analysis; a position adopted in the course of litigation lacks the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify *Chevron* deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 365 (4th Cir. 2000); *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000).

However, as *Mead* and *Christensen* make clear, courts do not face a choice between *Chevron* deference and no deference at all. Administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference: the agency position should be followed to the extent persuasive. *See Mead*, 121 S. Ct. at 2175-76 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). For

the reasons that follow, however, we do not find the EPA's position to be persuasive.

B. Defining "Addition"

The EPA's position, upheld by the *Gorsuch* and *Consumers Power* courts, is that for there to be an "addition," a "point source must *introduce* the pollutant into navigable water from the outside world." *Gorsuch*, 693 F.2d at 165. We agree with this view provided that "outside world" is construed as any place outside the particular water body to which pollutants are introduced. Given that understanding of "addition," the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a "discharge" that demands an NPDES permit.

Both *Gorsuch* and *Consumers Power* essentially involved the recirculation of water, without anything added "from the outside world." Such recirculation, they concluded, could not be an "addition." In *Gorsuch*, water was released from a reservoir through a dam to the stream below. Plaintiffs complained that such a release amounted to a regulated discharge under the Act, requiring a permit. The reservoir above the dam and the stream below, at least arguably, were sufficiently the "same" water that the release might not be considered an "addition"; nothing was introduced to the water that was not, in some sense, already there. See 693 F.2d at 174-75.

In *Consumers Power*, the defendant had withdrawn water from Lake Michigan, along with some surprised fish, for hydroelectric power generation. The water and fish were then returned to the Lake after passing through hydroelectric generators, which pureed some of the fish. The court found that returning the fish to the Lake, albeit in a different form, was not an "addition" because the fish had already been there. *See* 862 F.2d at 586. Indeed, the court

concluded that "[t]he water which passes through the [defendant's hydropower works] never loses its status as water of the United States." *Id.* at 589. The navigable water was recirculated, but nothing was added. The Sixth Circuit therefore also concluded that the releases from the defendant's hydropower works were not "introduced from the outside world." *See id.* at 586. Beyond *Consumers Power,* several cases from other circuits, despite having found "additions" to have occurred, in dicta reiterated the *Gorsuch* holding. *See, e.g., Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308-09 (9th Cir. 1993); *United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) ("Where 'pollutants' exist[ ] *in the waters of the United States* before contact with these facilities, the mere diversion in the flow of the waters [does] not constitute 'additions' of pollutants to the water.").

The *Gorsuch* and *Consumers Power* decisions comport with the plain meaning of "addition" assuming that the water from which the discharges came is the same as that to which they go.[3] If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagra Falls.

The present case, however, strains past the breaking point the assumption of "sameness" made by the *Gorsuch* and *Consumers Power* courts. Here, water is artificially diverted from its natural course and travels several miles

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[3] We need not and do not decide whether those courts were correct in accepting that the source and destination waters were identical and thus whether we would reach their conclusions if presented with the same facts.

from the Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility. When the water and the suspended sediment therein passes from the Tunnel into the Creek, an "addition" of a "pollutant" from a "point source" has been made to a "navigable water," and the terms of the statute are satisfied.

In *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), we implicitly held the release of polluted water from one water body to a distinct, less-polluted water body to be an addition of pollutants to the latter. We concluded that a "discharge" had occurred where leachate from a landfill entered a pond and thereafter water from the pond, polluted with the leachate, flowed through a culvert into a surrounding marsh. We held that (1) the pond and marsh were different navigable waters; (2) the culvert was the relevant point source; and (3) the release of pond water through the ? was a "discharge." We thus necessarily implied that the transfer of water from the pond to the marsh was an "addition" *Id* at 1354-55. We also expressly rejected the defendant's argument that the water flowing from pond to marsh was not an "addition," noting that "[u]nder this argument, pollutants would be 'added' only when they are introduced into navigable waters for the first time." *Id*. at 1354.

The First Circuit reached a similar conclusion in *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273 (1st Cir. 1996). In that case, a ski resort operator on Department of Agriculture property pumped water without a permit from a polluted river into a less-polluted pond to operate its snowmaking equipment. The court held that the transfer of polluted water from one water body to a distinct water body constitutes an "addition" of pollutants to the

destination water body. The court emphasized that the two bodies of water, for all relevant purposes, were distinct: although water naturally flowed from the pond into the river, water would never naturally flow from river to pond. That difference made the pumping an "addition." *See id.* at 1296-97. The court distinguished *Gorsuch* and *Consumers Power* as involving movement of water within the same water body. *See id.* at 1299.

The City also argues that "addition" draws meaning from its association with the phrase "from point source." This view misunderstands the import of the term "point source," which does not necessarily refer to the place where the pollutant was created but rather refers only the proximate source from which pollutant is directly introduced to the destination water body. A pipe from a factory draining effluent into a navigable water is a point source, but the factory itself is not. This is clear from the text of the Act, which defines "point source," in relevant part, as any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14). Under most circumstances, a "pipe, ditch, channel, tunnel, [or] conduit" is unlikely to have created the pollutants that it releases, but rather transports them from their original source to the destination water body.

As a "tunnel," Shandaken Tunnel plainly qualifies as a point source. The tunnel itself need not have created the pollution; it is enough that it conveys the pollutants from their original source to the navigable water. *See United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993). The City's proposed interpretation of "from a point

source" is inconsistent with the CWA's definition of a point source.

Given the ordinary meaning of the CWA's text and our holding in *Dague*, we cannot accept the *Gorsuch* and *Consumers Power* courts' understanding of "addition," at least insofar as it implies acceptance of what the *Dubois* court called a "singular entity" theory of navigable waters, in which an addition to one water body is deemed an addition to all of the waters of the United States. *See Dubois*, 102 F.3d at 1296-97. We properly rejected that approach in *Dague*. Such a theory would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants. Such an interpretation is inconsistent with the ordinary meaning of the word "addition."

Even if we were to conclude that the proper application of the statutory text to the present facts was sufficiently ambiguous to justify reliance on the legislative history of the statute, *see Blum v. Stenson*, 465 U.S. 886, 896 (1984), that source of legislative intent would not help the City. The legislative history is silent on the meaning of "addition." *See Gorsuch*, 693 F.2d at 175. Instead, the City relies principally on evidence from other provisions of the statute that Congress sought (1) to target industrial and municipal wastes specifically, *see Plaza Health Labs.*, 3 F.3d at 647, and (2) to leave the regulation of water supply—and therefore dam and reservoir operations—to the states, *see* 33 U.S.C. § 1251(g) ("It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this [Act].").

Yet like many complex statutes (and the CWA is among the most complex), the CWA balances a welter of consistent and inconsistent goals. In contrast with the policies cited by the City, the CWA also expressly includes a broad and uncompromising policy of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Artificially transferring water and pollutants between watersheds as the City has done here might well interfere with that integrity, as Catskill has alleged. Moreover, in the past we have applied the Act's proscriptions beyond industrial discharges. *See Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) (involving discharges of agricultural waste).

In any event, none of the statute's broad purposes sways us from what we find to be the plain meaning of its text. *Cf. Plaza Health Labs.*, 3 F.3d at 647 ("The narrow questions posed by this case . . . may not be resolved merely by simple reference to [the CWA's] admirable goal[s].") Where a statute seeks to balance competing policies, congressional intent is not served by elevating one policy above the others, particularly where the balance struck in the text is sufficiently clear to point to an answer. We find that the textual requirements of the discharge prohibition in § 1311(a) and the definition of "discharge of a pollutant" in § 1362(12) are met here.

CONCLUSION

The judgment of the district court is hereby reversed in part, vacated in part, and the case is remanded. We vacate so much of the judgment as dismissed Catskill's thermal discharge claims and remand the direction that those claims be dismissed without prejudice to refilling after full compliance with 33 U.S.C. § 1365(b) (1) (A). The remainder of the judgment dismissing the complaint is

reversed and remanded for further proceedings consistent with this opinion. Costs are awarded to the appellants.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DATED JUNE 4, 2002

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILLDELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

Plaintiff(s),

1:00-CV-511 (FJS/RFT)

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant(s).

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SCULLIN, Chief Judge	

U.S. DISTRICT COURT-N.D. OF N.Y.
FILED JUNE 4, 2002
LAWRENCE K. BAERMAN, CLERK-SYRACUSE

ORDER

Plaintiffs commenced this action under the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, to enjoin Defendants from polluting the Esopus Creek, a world-class trout stream, with highly turbid, muddy water, and for civil penalties for past violations.

Presently before the Court is PIaintiffs' motion for partial summary judgment declaring that Defendants are in violation of the CWA, 33 U.S.C. § 1311(a), every day that Shandaken Tunnel is in operation and that Defendants have violated CWA § 1311(a) on at least 347 days between

February 1, 1995 and December 30, 1998. On May 29, 2002, the Court heard oral argument with respect to this motion. At that time, the Court orally granted Plaintiffs' motion for partial summary judgment and advised counsel that a written Order would be forthcoming. The following constitutes the Court's written decision with respect to the pending motion.

The CWA prohibits the addition of any pollutant into navigable waters from any point source by an person without a permit. *See* 33 U.S.C. §§ 1311(a), 1362(12). Violators of this prohibition are strictly liable. *See Connecticut Fund for the Env't, Inc. v. Upjohn Co., 660* F. Supp. 1397, 1409 (D. Conn. 1987).

In the present case, there is no dispute that Esopus Creek is a navigable water, that Defendants are persons within the meaning of the CWA, and that Defendants do not have a permit. Nor can there be any dispute that the Shandaken Tunnel is a point source and that suspended sediment constitutes a pollutant now that the Second

Circuit has held that "[w]hen the water and the suspended sediment therein pass from the [Shandaken] Tunnel into the [Esopus] Creek, an 'addition' of a 'pollutant' from a 'point source' has been made to a 'navigable water,' and the terms of the statute are satisfied." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 492 (2d Cir. 2001).

Although Defendants filed papers in opposition to Plaintiffs' motion, they conceded in their papers as well as at oral argument that "[unnder the Second Circuit's decision, because the City has discharged and continues to discharge water containing suspended solids and turbidity through the Shandaken Tunnel into Esopus Creek, and because the City has no Clean Water permit for those discharges, . . . it may be viewed as strictly liable under the Act." See Defendants' Memorandum of Law at 2.

Given that the Second Circuit has already determined that whenever Defendants divert water and suspended sediment through the Shandaken Tunnel into

Esopus Creek, "the terms of the statute have been satisfied," Catskill Mountains Chapter of Trout Unlimited, Inc., 273 F.3d at 492, and Defendants' concession that in light of the Second Circuit's decision they have violated the CWA, the Court concludes that Plaintiffs are entitled to partial summary judgment with respect to the issue of liability. Accordingly, the Court hereby

ORDERS that Plaintiffs' motion for partial summary judgment with regard to the issue of liability is **GRANTED;** and the Court further

ORDERS that the parties are to contact Magistrate Judge Treece's chambers within **ten days** of the date of this Order to schedule a conference to discuss how this action can be expedited to ensure that a trial on the issue of damages can be scheduled as soon as possible.

IT IS SO ORDERED.

Dated: June 4, 2002
Syracuse, New York

s/_____

Frederick J. Scullin, Jr.
Chief United States District Judge

MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DATED FEBRUARY 6, 2003

(Reported at 244 F. SUPP. 2d 41)

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILLDELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

Plaintiff(s),

1:00-CV-511 (FJS/RFT)

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant(s).

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SCULLIN, Chief Judge	

U.S. DIST. COURT-N.D. OF N.Y.
FILED FEBRUARY 6, 2003
LAWRENCE K. BAERMAN

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On November 20, 1998, Plaintiffs served Defendants, the New York State Department of Environmental Conservation ("DEC"), and the Environmental Protection Agency ("EPA") with a Notice of Intent to Sue. On March 31, 2000, Plaintiffs filed their complaint in this action. *See* Dkt. No. 1. On October 6, 2000, this Court dismissed Plaintiffs' turbidity and thermal discharge claims for failure to state a claim. *See* Dkt. No.

19. Thereafter, on October 21, 2001, the Second Circuit reversed in part this Court's decision and remanded this action for further proceedings. *See* Dkt. No. 32.

Subsequently, Plaintiffs filed a motion for partial summary judgment, seeking a declaration that Defendants had violated the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), by discharging turbidity and suspended solids from the Shandaken Tunnel into the Esopus Creek without a permit, including 347 days between February 1, 1995 and December 30, 1998.[1] *See* Dkt. No. 44. On June 4, 2002, the Court granted Plaintiffs' motion for summary judgment on the issue of liability and directed the parties to contact Magistrate Judge Treece's chambers to discuss how this action could be expedited to ensure that a trial on the issue of damages could be scheduled as soon as possible. *See* Dkt. No. 66.

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[1] According to Defendants' Exhibit "D-17," the Shandaken Tunnel was in operation on 1,015 days between February 1, 1995 and December 30, 1998.

The Court held a bench trial commencing on January 8, 2003, to determine the amount of civil penalties, if any, that Defendants should be required to pay pursuant to 33 U.S.C. § 1319(d), and what form of injunctive relief, if any, the Court should impose upon Defendants for operating the Shandaken Tunnel without a SPDES permit in violation of the CWA. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the following constitutes the Court's findings of fact and conclusions of law with respect to these issues.

II. DISCUSSION

A. Findings of Fact

Plaintiffs Catskill Mountains Chapter of Trout Unlimited, Inc. ("CMCTU"), Theodore Gordon Flyfishers, Inc. ("TGF"), Catskill-Delaware Natural Water Alliance ("CDNWA"), Federated Sportsmen's Clubs of Ulster County, Inc. ("FSC"), and Riverkeeper, Inc., are not-for-profit corporations organized under the laws of the State of New York. Members of CMCTU, TGF, CDNWA, and FSC

live near the Esopus Creek and enjoy the Esopus Creek for numerous activities, including, but not limited to, flyfishing. Riverkeeper, whose mission is to protect the environmental resources of the Hudson River and its tributaries, including the Esopus Creek, has members who fish in the Esopus Creek.

At trial, Bert Darrow, a member of TGF and CMCTU and a professional flyfisherman and licensed flyfishing guide, testified that prior to 1996 he used the Esopus Creek as his primary fishing location for personal as well as business uses. However, since that time, the turbid water in the Esopus Creek has made fishing difficult because the trout cannot see cast lines and flies and dangerous because the fishermen cannot see the bottom of the Creek. As a result, he does not fish in the Esopus Creek very often, and he takes his clients to other streams.

Ron Urban and Bruce Duffy, who are also members of CMCTU, testified that they have observed a significant increase in turbidity in the Esopus Creek below the

Shandaken Tunnel and that they find that the turbidity is visually offensive and creates unsafe conditions for wading. Brother John Farrell, a member of ESC, has fished in the Esopus Creek since the mid-1980s. He testified that since 1996 he has observed that the Esopus Creek below the Shandaken Tunnel has become more turbid, causing it to be unsafe and affecting his aesthetic enjoyment of the Esopus Creek. He also testified that he very seldom fishes below the Shandaken Tunnel, except with an older friend who lives on the Esopus Creek in that area.

Defendant City of New York, by and through Defendant New York City Department of Environmental Protection ("NYCDEP"), is the owner and operator of the largest unfiltered drinking water supply in the United States.[2] Defendants provide high quality water to more than nine million residents of New York State, including eight million people who live in New York City and approximately one million people who live in Westchester,

Putnam, and Rockland Counties. Defendant NYCDEP conducts and oversees operation of the Shandaken Tunnel.

The Catskill water supply system provides approximately forty percent of New York City's daily drinking water needs under normal operating conditions. This system consists of two reservoirs, the Ashokan and the Schoharie. The Shandaken Tunnel began operating in 1924. The water in the Schoharie Reservoir is diverted to the Esopus Creek, the main tributary to the Ashokan Reservoir, through the Shandaken Tunnel. The Shandaken Tunnel has a flow capacity of up to 650 million gallons per day. When the Shandaken Tunnel is in operation, water from the Schoharie Reservoir enters the Shandaken Tunnel through an intake channel on or in the bed of the Schoharie Reservoir. The Shandaken Tunnel runs approximately eighteen miles from the intake structure at the Schoharie Reservoir to the portal from which it discharges into the Esopus Creek eleven miles upstream of the Ashokan

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[2] Defendant Joel Miele is the Commissioner of NYCDEP.

Reservoir. The Catskill aqueduct, which moves water from the Ashokan Reservoir to New York City's Kensico Reservoir in Westchester County, has a capacity of up to 610 million gallons per day. Two aqueducts bring water from the Kensico Reservoir into New York City.

The Catskill Mountains are characterized by extensive deposits of silts and clays that are continuous for miles in the valleys through which streams tributary to the Catskill reservoirs now flow. The Ashokan Reservoir is designed to provide settling time to minimize the turbidity of Catskill water by the time it enters the Catskill aqueduct on its way to New York City so that the water entering New York City's distribution system meets drinking water standards. The water discharged through the Shandaken Tunnel into the Esopus Creek is frequently substantially, visibly more turbid and higher in suspended solids than the receiving water because of the system design and the geology of the Schoharie drainage basin. The suspended solids present in the Schoharie Reservoir are caused, at

least in part, by erosion in the Schoharie Watershed, including erosion resulting from land disturbance from human activities.

The New York State Department of Environmental Conservation ("DEC") has designated the Esopus Creek, between the outlet of the Shandaken Tunnel and the inlet of the Ashokan Reservoir, as a class A(T) stream. The water quality standard for discharges of turbidity to a class A(T) stream is "no increase that will cause a substantial visible contrast to natural conditions." N.Y. Comp. Codes R. & Regs. tit. 6, § 703{2) (2002).

Pursuant to 33 U.S.C. § 1342, the Administrator of the EPA has delegated to the State of New York the authority to issue State Pollutant Discharge Elimination System ("SPDES") permits to dischargers in this State. DEC is the state agency that administers the SPDES program in New York. Defendants do not have a CWA permit or a SPDES permit for the operation of the Shandaken Tunnel, and, until the Second Circuit's decision

on October 21, 2001, they maintain that they believed that they did not need a SPDES permit to operate the Shandaken Tunnel. Defendants operated the Shandaken Tunnel without a permit and, thus, in violation of the CWA on a total of 2,326 days from February 1, 1995 to December 31, 2002. See Defendants' Exhibit "D-17;" Letter to Court dated January 23, 2003.[3]

B. Conclusions of Law

1. Standing

An organization has standing to bring an action on behalf of its members if it can establish that "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*

[3] After the trial was completed, the Court requested that Defendants submit a record of the discharges through the Shandaken Tunnel for the calendar year 2002, rather than rely upon an approximation based upon prior history. Defendants responded to the Court's request with the January 23, 2003 letter and attached chart.

(TOC), Inc., 528 U.S. 167, 181 (2000) (citation omitted). To establish individual standing a person must show

> (1) [that he/she] has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 180-81.

In the present case, the testimony of Bert Darrow, Ron Urban, Bruce Duffy, and Brother John Farrow establishes that Plaintiffs have standing to bring this suit on behalf of their members. Each of these individuals testified that, at least since 1996, Defendants' discharge of water through the Shandaken Tunnel into the Esopus Creek has interfered with their enjoyment of the Esopus Creek -- both aesthetically and in their ability to fish safely in the Esopus Creek --and, in the case of Bert Darrow, has interfered with his business as a fly-fishing guide. Such injury is both concrete and particularized as well as fairly traceable to Defendants' actions. In addition, a decision in Plaintiffs'

favor - i.e., requiring Defendants to reduce the turbidity of the water that flows through the Shandaken Tunnel into the Esopus Creek - will redress their injuries.

Accordingly, based upon the testimony of Plaintiffs' members, the Court concludes that Plaintiffs have standing to bring suit against Defendants under the citizen-suit provision of the CWA.[4]

2. Civil Penalties

As noted, this Court previously determined, upon remand from the Second Circuit, that Defendants had violated the CWA.[5] Thus, the only remaining issue is the amount of civil penalties and the nature of the injunctive relief that the Court should assess against Defendants.[6] In making its

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[4] The Court notes that Defendants have never challenged Plaintiffs' standing. Moreover, at the summary judgment stage, both this Court and the Second Circuit implicitly concluded that Plaintiffs had standing to maintain this suit.

[5] Defendants conceded that, in light of the Second Circuit's October 21, 2001 decision, they were liable for violating the CWA.

[6] Several courts have stated that "[c]ivil penalties are mandatory once Clean Water Act violations are found, although the amount to be assessed is wholly within the discretion of the court." *Hawaii's Thousand Friends v. City & County of Honolulu*, 821 *F.*

determination, the Court must keep in mind that the purpose of the CWA's penalty provision is "deterrence with respect to both *the* violator's future conduct (specific deterrence) and the general population regulated by the Act (general deterrence)." *United States v. Mun. Auth. of Union Township,* 929 F. *Supp.* 800, 806 (M.D. Pa. 1996), *aff'd,* 150 F.3d 259 (3d Cir. 1998) (citation omitted). To attain the goal of deterrence, the penalty must have two components: (1) "it must encompass the economic benefit of noncompliance to ensure that the violator does not profit from its violation of the law" and (2) it "must include a punitive component in the form of a sum in addition to

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Supp. *1368, 1394 (D.* Haw. 1993) (citing *Atlantic States Legal Foundation v. Tyson Foods, Inc., 897* F.2d 1128, 1142 (11th Cir. 1990); *Stoddard v. Western Carolina Regional Sewer Authority,* 784 F.2d 1200, 1208 (4th Cir. 1986)); *see also Piney Run Pres. Ass'n v. County Comm'rs of Carroll County, 82 F.* Supp. 2d 464, 470 (D. Md. *2000), vacated and remanded on other grounds,* 268 F.3d 255 (4th Cir. 2001) ("The 'highly discretionary calculations necessary to assess penalties [under the CWA] are particularly within the purview of trial judges' and, therefore, are granted wide deference." (quotation omitted)). In addition, some courts have held that the issues of intent and fault are not relevant to the issue of whether the court should impose penalties but are only relevant with respect to the issue of the amount of the penalty. *See, e.g., United States v. Ohio Edison Co., 725* F. Supp. *928, 934 (N.D.* Ohio *1989)* (citations omitted).

economic benefit which accounts for the degree of seriousness and/or willfulness of the violations." *Id.*

Section 1319 of the CWA sets forth six factors that a court must consider when determining the amount of civil penalties to impose against a defendant:

> [1] the seriousness of the violation or violations, [2] the economic benefit (if any) resulting from the violation, [3] any history of such violations, [4] any good-faith efforts to comply with the applicable requirements, [5] the economic impact of the penalty on the violator, and [6] such other matters as justice may require.

33 U.S.C. § 1319(d).

Moreover, when applying these factors to a particular situation, "courts generally employ either a 'top-down' or 'bottom-up' method."[7] *Piney Run Pres. Ass'n v. County Comm'rs of Carroll County,* 82 F. Supp. 2d 464, 470 (D. Md. 2000), *vacated and remanded on other grounds, 268*

[7] The Second Circuit has not determined whether the "top-down" or the "bottom-up" approach is the appropriate means of calculating civil penalties under the CWA.

F.3d 255 (4th Cir. 2001) (citation omitted); *compare Union Township,* 929 F. Supp. at 806 (finding that "top-down" approach is not appropriate and choosing, instead, to "begin with economic gain and add a sum to that figure guided by the other § 1319(d) factors and the need for punishment and deterrence"); *with Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1137 (11th Cir. 1990) (finding that "top-down" approach is the appropriate methodology for calculating CWA penalties).

If the "top-down" approach is used, the court will "first calculate the maximum penalty based on the $25,000 [$27,500 or $31,500] per day figure,[8] then adjust the figure down, as necessary, to account for the six factors listed in § 1319(d)." *Piney Run,* 82 F. Supp. 2d at 470 (citing *[Smithfield,* 191 F.3d] at 528 n.7); *see* 40 C.F.R. § 19.4. If, on the other hand, the court employs the "bottom up"

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[8] The maximum penalty is $25,000 per day for violations occurring on or before January 30, 1997, *see* 33 U.S.C. § 1319(d), $27,500 per day for violations occurring between January 31, 1997 and August 19, 2002, and $31,500 per day for violations occurring thereafter, *see* 40 C.F.R. § 19.4.

method, the court will first "determine the economic benefit the defendant derived by violating the [CWA], and then adjust that figure upward or downward using the remaining five factors in § 1319(d)." *Piney Run*, 82 F. Supp. 2d at 470 (citing *[Smithfield*, 191 F.3d at 528]).

For the reasons addressed below in its discussion of the economic benefit factor, based upon the circumstances of this case, the Court concludes that the "top down" approach provides the appropriate manner in which to determine the amount of civil penalties that should be awarded against Defendants for their violations of the CWA.

a. Maximum amount of penalties

Although the parties stipulated that the Shandaken Tunnel discharged water into the Esopus Creek on 1,983 days between February 1, 1995 and December 31, 2001, and approximately 150 days in 2002, the Court reviewed Defendants' Exhibit "D-17" (Bates 15935-15942), plus the additional data for the year 2002, which the Court

requested, and determined that the Shandaken Tunnel was in operation for a total of 2,326 days during this period: 308 days (1995) + 185 days (1996) + 247 days (1997) + 275 days (1998) + 320 days (1999) + 280 days (2000) + 349 days (2001) + 362 days (2002).

Using these numbers, the Court then calculated the maximum civil penalties as follows:

Year	**Days**	**Maximum Penalty Per Day**	**Total**
1995	308	$25,000	$ 7,700,000
1996	185	$25,000	$ 4,625,000
1997	3	$25,000	$ 75,000
	244	$27,500	$ 6,710,000
1998	275	$27,500	$ 7,562,500
1999	320	$27,500	$ 8,800,000
2000	280	$27,500	$ 7,700,000
2001	349	$27,500	$ 9,597,500
2002	231	$27,500	$ 6,352,500
	131	$31,500	$ 4,126,500
		TOTAL:	**$63,249,00**

Using this figure as a starting point, the Court will address each of the six factors set forth in § 1319(d) in turn.

b. The seriousness of the violation or violations

To determine the seriousness of a defendant's violations, the court should consider "the frequency and severity of the violations as well as their effect on the environment." *Piney* ***Run,*** 82 F. Supp. 2d at 471 (citing *United States v. Smithfield Foods, Inc., 972 F. Supp. 338,* 343 (E.D. Va. 1997)). Although some courts have acknowledged that "a significant penalty maybe appropriate even absent proof of actual negative effect," *id.* (citing *([Smithfield,* 972 F. Supp.] at 344), other courts have found that the lack of material environmental harm is a significant mitigating factor even though the defendant has violated the CWA a significant number of times. *See Atlantic States Legal Found. Inc. v. Universal Tool & Stamping Co., Inc., 786* F. Supp. *743,* 747-49 (N.D. Ind. 1992) (finding that, even though the defendant had violated its CWA permit more than 1,900 times during the relevant period, the lack of material environmental harm was a significant mitigating factor).

As noted, Defendants operated the Shandaken Tunnel without a permit, and thus violated the CWA, on 2,326 days between February I, 1995 and December 31, 2002.[9] While this is a significant number of violations, the Court must also weigh the fact that the turbidity and suspended solids which Defendants discharged through the Shandaken Tunnel were not toxic and, at least in part, were the result of the natural conditions of the water that flowed through that Tunnel. Moreover, although there was some evidence at trial that the trout below the Shandaken Tunnel were smaller than the trout above the Shandaken Tunnel, there was no evidence of a significant decrease in the number of trout or of any trout kill as a result of the discharges. In fact, there was evidence that without the

[9] February 1, 1995 is the appropriate starting date for determining the amount of civil penalties to be awarded in this case because "in citizen enforcement actions the five-year statute of limitations period [set forth in 28 U.S.C. § 2462] is tolled sixty days before the filing of the complaint, to accommodate the statutorily-mandated sixty-day notice period." *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524 (9th Cir. 1987). Since Plaintiffs filed their complaint in this action on March 31, 2000, the five-year statute of limitations was tolled on February 1, 1995.

discharge of the water through the Shandaken Tunnel, there would have less habitat for trout because of low water levels. Based upon this evidence, the Court considers this element to be a mitigating factor.

c. The economic benefit resulting from the violations

The economic benefit that the violator enjoys as a result of violating the CWA is "[a] critical component of any penalty analysis under the [CWA] ...." *United States v. Allegheny Ludlum Corp.*, 187 F. Supp. 2d 426, 436 (W.D. Pa. 2002). "The goal of economic benefit analysis is to prevent a violator from profiting from its wrongdoing." *Id.* (citing *Dean Dairy, 150* F.3d at 263). Since it is difficult to prove precise economic benefit, "'reasonable approximations ... will *suffice.*" *Piney Run,* 82 F. Supp. 2d at 470 (quoting *Smithfield,* 191 F.3d at 529). In making this determination, "the court must endeavor to reach a "'rational estimate of [the violator's] economic benefit, *resolving uncertainties in favor of a higher estimate.*"'"

Union Township, 929 F. Supp. at 806 (quotation omitted). "The estimate 'must encompass *every* benefit that defendants received from violation of the law.' *Id.* (quotation omitted). "It would eviscerate the [CWA] to allow violators to escape civil penalties on the ground that such penalties cannot be calculated with precision." *Id.* at 806-07.

There are two elements to the calculation of economic benefit: "(1) the benefit that the [defendant] received from delayed capital spending (i.e., money saved by delay in issuing and making payments on general obligation bonds to finance the construction of the required pollution control equipment); and (2) the operating and maintenance ("O & M") expenses for the pollution control equipment that the [defendant] avoided operating during the period compliance was delayed." *Hawaii's Thousand Friends, 821* F. Supp. at 1387.

Plaintiffs did not submit any evidence with respect to the benefit that Defendants received by delaying capital

spending. Rather, they focused their proof with respect to economic benefit on the operating and maintenance expenses that Defendants would have incurred had they built a coagulation plant near the Shandaken Tunnel. Dr. Bell testified that, by not building a coagulation plant, Defendants saved $27,083,833 in operational and maintenance costs for the period of February 1, 1995 through December 31, 2001. Although Defendants offered the testimony of David Nickols to rebut Dr. Bell's figures and the feasibility of Dr. Bell's design and his estimates of operational and maintenance costs, they did not present any other figure for the Court's consideration. In fact, based upon Mr. Nickols' testimony, if the Court were to take some of Defendants' arguments into consideration, the potential "economic benefit" to Defendants of not building a coagulation plant would increase.

That being said, however, the Court has some problems with Dr. Bell's testimony as it relates to the economic benefit that Defendants received as a result of

their violation of the CWA. First, the Court questions the feasibility of Dr. Bell's plan, both from a design and construction standpoint as well as an operational and maintenance perspective since he did not take into account the environmental impact of his design or the on-going effects on the environment -- such as the increased traffic -- that the construction of such a plant would have. In addition, Dr. Bell did not take into consideration the time required to design and construct such a facility. Mr. Nickols, however, estimated that it would take several years.

Allowing for several years to construct a coagulation plant of the type Dr. Bell suggested, the Court then must determine the appropriate date from which to measure the economic benefit of not constructing such a facility. If the Court were to measure the operational and maintenance savings from February 1, 1995, as Dr. Bell did, this would require a finding that Defendants should have begun work on the design and construction of a

coagulation plant in approximately 1990.[10] If, on the other hand, the Court determines that Defendants should have begun work on the design and construction of a coagulation plant on February 1, 1995 (when the statute of limitations was tolled for purposes of this action), November 20, 1998 (the date on which Plaintiffs served Defendants with their Notice of Intent to Sue), or October 21, 2001 (when the Second Circuit issued its decision), the operational and maintenance costs that Plaintiffs avoided would be far less than the $27,083,833 that Dr. Bell estimated because Defendants would not have incurred such costs until several years after they began construction on the coagulation plant.[11]

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[10] It would be unreasonable for the Court to measure Defendants' economic benefit from this date in light of the Court's finding, *see* discussion *infra* Part 11.B.2.d, that it was reasonable for Defendants to believe, prior to October 21, 2001, that they did not need a SPDES permit to operate the Shandaken Tunnel.

[11] Assuming that it would have taken Defendants five years to design and build a coagulation plant, the earliest date that such a plant would have come on line, using February 1, 1995, as a starting date, is approximately February 1, 2000. Applying the numbers in Dr. Bell's Table 5-1, *see* Plaintiffs' Exhibit "P-83," the approximate operational and maintenance costs that Defendants

Nonetheless, despite the Court's problems with Dr. Bell's opinion regarding the economic benefit that inured to Defendants by not building a coagulation plant, the Court finds that this element is not a mitigating factor.[12]

d. Any history of such violations

In determining the history of a defendant's violations, the court must consider "not only similar violations in the past, but also the duration and continuity of the [defendant's] present violations." *Piney Run, 82 F.* Supp. 2d at 471 (citing *Smithfield Foods, 972* F. Supp. *at*

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avoided by not having the coagulation plant in operation for the years 2000 through 2002 is roughly **$13,684,759** ($4,198,979 (2000) + $4,551,718 (2001) + $4,934,062 (2002), assuming that the costs in *2002* increased by 8.4% over 2001. This is a very rough estimate because in Dr. Bell's table all costs are shown in 2001 dollars and the Court's 2002 costs are not.

[12] The Court notes that § 1319(d)'s economic benefit element, the purpose of which is, at least in part, to ensure that a violator does not gain an economic advantage over its competitors, is of limited assistance to a court's determination of the appropriate amount of civil penalties to assess against a municipality which does not compete to provide water to its citizens. Moreover, a court must balance the economic feasibility of any proposed solution against the need of the municipality's citizens for an adequate water supply.

349).

The evidence adduced at trial demonstrated that Defendants recognized the need to address, and have worked to formulate a plan to address, the turbidity problem in the Catskill system since 1993.[13] However, as Dr. Principe testified, Defendants did not believe that they needed a SPDES permit to operate the Shandaken Tunnel until October 21, 2001, when the Second Circuit concluded that such a permit was necessary.

The Court finds that Defendants' belief, prior to October 21, 2001, that they did not need a SPDES permit to operate the Shandaken Tunnel was reasonable. In this

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[13] In 1993, a Filtration Avoidance Determination ("FAD") was issued, which addressed the turbidity problems in the Catskill system. *See* Defendants' Exhibit "D-12" - "Short- and Long-term Plans to Reduce Turbidity in Schoharie and Ashokan Reservoirs," dated June 1993; Defendants' Exhibit "D-14" - "Determination on Filtration of New York City's Catskill and Delaware Water Supplies, dated January 19, 1993; Defendants' Exhibit "D-23" - "Short- and Long-terra. Plans to Reduce Turbidity in Schoharie and Ashokan Reservoirs, 1993 4th Quarter Report," dated January 1994. In addition, the most recent FAD, dated November 2002, included long-term programs to reduce turbidity with time lines. *See* Defendants' Exhibit "D-61" - "New York City Filtration Avoidance Determination," USEPA - November 2002 - "Surface Water Treatment Rule Determiantion for New York City's Catskill/Delaware Water Supply System."

regard, the Court notes that, although the EPA and DEC closely monitored the quality of Defendants' water supply pursuant to other statutes and were aware that Defendants discharged water through the Shandaken Tunnel as part of their water system, Dr. Principe testified that neither the EPA nor DEC ever suggested to Defendants that they needed a SPDES permit to operate the Shandaken Tunnel.[14] For these reasons, the Court finds that this element is a mitigating factor.

e. Any good faith efforts to comply with the applicable requirements

Once Defendants were aware that they were required to have a SPDES permit to operate the Shandaken Tunnel (October 21, 2001), they began discussions with DEC to determine what information DEC would need before it could issue Defendants such a permit. Although Defendants and DEC met on only one or two occasions

[14] In fact, on numerous occasions, DEC required Defendants to release water through the Shandaken Tunnel. *See, e.g.* Defendants' Exhibits "D-6," "D-8."

during the year following the Second Circuit's decision, as Dr. Principe noted, at the time Defendants received the Second Circuit's decision, shortly after the terrorist attack on September 11, 2001, they were in the midst of addressing other serious issues, including the safety of New York City's water supply.[15] In addition, although somewhat belatedly, Defendants did file a SPDES permit application on December 31, 2002.[16]

Based upon the evidence presented at trial, the Court concludes that Defendants' failure to apply for a SPDES permit until fourteen months after the Second Circuit's decision does not evidence a lack of good faith. When viewed against the backdrop of the September 11, 2001 terrorist attack and Defendants' compelling need to

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[15] The Court notes that it found Dr. Principe to be a very credible and forthright witness, who readily acknowledged the need to address the turbidity problem in the Catskill water supply system. Moreover, the Court found Dr. Principe's knowledge of Defendants' water supply system and the regulations that govern this system to be very helpful to its analysis.

[16] Dr. Principe acknowledged that at least part of the impetus for filing the permit at that time was the pending trial in this matter.

ensure, as their first priority, that New York City's water supply was safe, this delay -- although somewhat extended -- was not undue. Moreover, although Plaintiffs make much of the fact that everything that Defendants have done in the past with respect to the turbidity problem was done because of other statutes, and not in an attempt to comply with the CWA, the Court is not convinced that the particular impetus for Defendants' actions is as important as the fact that Defendants have made efforts to abate the turbidity problem and continue to do so. Accordingly, based upon Defendants' ongoing efforts to address the turbidity issue and the fact that Defendants reasonably believed that they did not need a SPDES permit to operate the Shandaken Tunnel prior to the Second Circuit's decision on October 21, 2001, the Court finds that this element is a significant mitigating factor.[17]

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[17] The Court notes, however, its concern that Defendants provided the Court with very little evidence to explain why they apparently failed to take any affirmative steps to comply with the Second Circuit's October 21, 2001 decision in a more expeditious manner. Had they done so, the Court would have been inclined to find that this

f. The economic impact of the penalty on the violator

"The central purpose of CWA penalties is to deter the defendant, and others, from committing future violations." Piney *Run, 82* F. Supp. 2d at 472 (citation omitted). "A damage award that is limited to economic benefit, therefore, is no deterrent at all because the violator would be no worse off than if it had complied in the first place." *Id.* (citation omitted); *see also Hawaii's Thousand Friends,* 821 F. Supp. at 1396 (finding that the economic impact of the penalty was not a mitigating factor where the penalty would result in only "a slight increase in the monthly rates paid by users of the sewer system").

The only evidence at trial with regard to this element indicates that Defendants could absorb the maximum penalty without serious consequences to their financial well-being. At his deposition, William

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element required an even greater mitigation of the maximum penalty allowable under § 1319(d).

Kusterbeck, Treasurer of the New York City Water Board, stated that the New York City Water Board maintains a $60,000,000 operations and maintenance reserve fund, equal to one month's operations and maintenance expenses, in part, to pay for unanticipated NYCDEP expenses incurred in water supply or distribution. *See* Transcript of Deposition of William Kusterbeck, dated September 18, 2002, at 28. Moreover, every million dollars in assessed penalties will result in only a one-time $.30 increase in the average water user's annual rate payment. Thus, the Court concludes that this element is not a mitigating factor.

g. Such other matters as justice may require

Assessing a monetary penalty in this case would be tantamount to saying that if you believe in good faith that your activities are not subject to a CWA permit and neither the EPA nor DEC has ever indicated that you needed such a permit, you can be penalized if a citizen suit is commenced against you and the court finds that you are wrong. *See United States v. Bay-Houston Towing Co., Inc.,*

197 F. Supp. 2d 788, 826 (E. D. Mich. 2002). Thus, the Court finds that this element is a mitigating factor.

h. Calculation of civil penalties

As noted, the Court has used the top-down approach to calculate the amount of civil penalties to be assessed against Defendants. Therefore, the Court began its calculation with the maximum civil penalties that could be awarded against Defendants for the period from February 1, 1995 through December 31, 2002, i.e., $63,249,000. Having analyzed the other § 1319 factors, the Court finds that the lack of material environmental harm, Defendants' reasonable belief, prior to October 21, 2001, that they did not need a SPDES permit to operate the Shandaken Tunnel, and Defendants' efforts to address the turbidity problems, both before and after October 21, 2001, are mitigating factors. The Court also finds that, at the time of the Second Circuit's decision, it was reasonable for Defendants to focus much, if not all, of their attention upon the need to protect the water supply from any future terrorist attacks.

Thus, their delay in submitting an application for a SPDES permit for at least several months was reasonable. Although the Court finds that the fourteen month delay was somewhat extended, the Court, nonetheless, concludes that an eight month delay, i.e., until June 2002, would not have been unreasonable. Therefore, the Court concludes that no civil penalties should be assessed against Defendants for any violations occurring prior to June 22, 2002. This conclusion requires that the Court subtract $57,500,500 from the maximum allowable penalty to arrive at the final figure of $5,749,000.

3. Injunctive relief

In citizen suit proceedings, district courts are statutorily authorized to enter injunctions. *See 33* U.S.C. § 1365(a). "The proof of irreparable injury and the inadequacy of legal remedies are prerequisites to the granting of injunctive relief in a CWA case." *Cmty. Ass'n for Restoration of Env't ("CARE") v. Henry Bosma Dairy,* No. CY-98-3011, 2001 WL 1704240, *16 (ED. Wash.

2001) (citation omitted). "The Court must also balance the competing claims of injury and the public interest." *Id.* (citation omitted); see also *Million Youth March, Inc. v. Safir*, 155 F.3d 124, 126 (2d Cir. 1998) (stating that "when a federal district court crafts an injunction to vindicate a plaintiffs protected rights, it cannot simply order whatever a City is physically capable of doing, without regard to considerations of public health, safety, convenience, and cost.").

"Injunctive relief cannot automatically be granted upon a finding of statutory violation." *Intl Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO v. Amerace Corp., Inc.*, 740 F. Supp. 1072, 1086 (D.N.J. 1990) (citing *Weinberger v. Romero-Barcelo, 456 U.S. 305,* 312, 102 S. Ct. 1798, 1803, 72 L. Ed. 2d **91** (1982)) (other citation omitted). Nor can "irreparable injury ... be presumed from the mere fact that the Clean Water Act has been violated." *Id.* In determining whether to grant an injunction, "a court must balance the competing claims of

injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 542 (1987). Moreover, although the court should give particular regard to the public interest, "'[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.'" *Id.* (quoting *[Weinberger v. Romero-Barcela,* 456 U.S.] at 313, 102 S. Ct., at 1803).

Based upon the circumstances of this case, the Court concludes that it would be an improper use of injunctive relief to enjoin Defendants from operating the Shandaken Tunnel until they obtain a SPDES permit.. This does not mean, however, that the Court is without power to fashion some form of injunctive relief which will take into account the injury of both sides of this dispute and, at the same time, to bring the discharges from the Shandaken

Tunnel "into 'prompt' compliance with the [CWA]." *United States v. Confederate Acres Sanitary Sewer & Drainage Sys., Inc.*, 767 F. Supp. 834, 837 (W.D. Ky. 1990) (citation omitted).

Fashioning effective injunction relief in this case, however, is complicated by the fact that, resolution of this problem, to some extent, rests with DEC, as it is the only agency with the authority to issue a SPDES permit. Thus, for the Court to order Defendants to obtain a SPDES permit within a certain time frame would be ineffective if DEC failed to cooperate. However, under the All Writs Act,[18] the Court's power "to effectuate the injunction may extend to 'persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice.'" *Id.* (quoting *United States v.*

[18] The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

New York Telephone Company, 434 U.S. 159, 174, 98 S. Ct. 364, 373, 54 L. Ed. 2d 376 (1977)) (citing *United States v. Wallace*, 218 F. Supp. 290 (N.D. Ala. 1963)).

The testimony at trial indicated that, on average, DEC acts on an application for a SPDES permit within eighteen months. Given this timetable, the Court instructs Defendants that they are to provide DEC with all of the information that DEC needs to issue Defendants a SPDES permit as soon as practicable after DEC requests any such information. Moreover, pursuant to its authority under the All Writs Act, the Court instructs DEC, who is now a third-party Defendant in this action, to complete the application process and issue a SPDES permit to Defendants within eighteen months of the date of this Order. If, for any reason, DEC believes that it will be unable to complete the process and issue a permit to Defendants within this time frame, DEC is to inform the Court and the parties to this action in writing as to the reason for any delay as soon as DEC realizes that there will be a delay. In addition, the

Court instructs Defendants to provide the Court and opposing counsel on the first day of each month, beginning March 1, 2003 and continuing until such time as they obtain a SPDES permit, a written status report as to the progress they have made towards obtaining a SPDES permit and any other measures Defendants have made toward reducing the turbidity of the water that is discharged through the Shandaken Tunnel. Finally, the Court instructs Defendants to notify the Court and opposing counsel in writing when they receive a SPDES permit and are to file a copy of this permit with the Court.

C. Costs and Fees

In addition to civil penalties and injunctive relief, the CWA provides that a court "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d). *See Tyson Foods,* 897 F.2d at 1143 (finding that in a case in which "a citizens group has

succeeded on the merits, [the court could not] conceive of any grounds that would justify a denial of fees and costs."). A plaintiff who prevails in the liability phase of a CWA citizens suit is a prevailing party within the meaning of § 1365(d). *See CARE, 2001 WL* 1704240, at *17. Moreover, "[t]he award should be equal to full compensation comparable to that of a fee-paying client." *Hudson River Fishermen's Ass'n v. Arcuri, 862 F. Supp. 73, 78 (S.D.N.Y.* 1994) (citing *Missouri v. Jenkins,* 491 U.S. 274, 286, 109 S. Ct. 2463, 2470-71, 105 L. Ed. 2d 229 (1989)).

In their complaint, Plaintiffs seek attorneys' fees and costs. Since Plaintiffs prevailed in the liability phase of this action, the Court concludes that they are prevailing parties within the meaning of § 1365(d). As such, they are entitled to an award of reasonable attorneys' fees and costs. Therefore, the Court instructs Plaintiffs to file and serve an application for such an award within ten days of the date of this Order. In calculating the attorneys' fees portion of their application, the Court instructs Plaintiffs that their

application must comply with the following rules. First, Plaintiffs must submit contemporaneous time records. Failure to do so will result in the Court substantially reducing the amount of attorneys' fees requested. *See New York v. RAC Holding, Inc.*, 135 F. Supp. 2d 359, 363-65 (N.D.N.Y. 2001). Second, Plaintiffs shall calculate the amount of the fees they are requesting as follows: (1) the hourly rate for work attributable to a law intern is $65.00; (2) the hourly rate for work attributable to Mr. Coplan or any other admitted attorney is $125.00, unless that attorney can demonstrate that he has practiced in the area of environmental law for more than ten years, in which case the appropriate hourly rate is $175.00. *See IBEW Local No. 910 Welfare, Annuity & Pension Funds v. Dexelectrics, Inc., 98* F. Supp. 2d 265, 275 (N.D.N.Y. 2000).

Once Plaintiffs have filed and served their application for attorneys' fees and costs; Defendants must file and serve any objections they have to the application no later than fourteen days after service of the application

upon them. Once the Court has received the parties' submissions, it will take the application under advisement and will issue an Order amending the Judgment accordingly.

IV. CONCLUSION

Based upon the evidence adduced at trial and the applicable law and for the reasons stated herein, the Court hereby

ORDERS that Defendants are liable for civil penalties in the amount of $5,749,000 pursuant to § 1319(d); and the Court further

ORDERS that Defendants are to pay these civil penalties to the United States Treasury pursuant to § 1365(a); and the Court further

ORDERS the following injunctive relief pursuant to § 1365(a) and the All Writs Act: (1) Defendants are to provide DEC with all of the information that DEC needs to issue Defendants a SPDES permit as soon as practicable after DEC requests any such information, (2) DEC is to

complete the application process and issue a SPDES permit to Defendants within eighteen months of the date of this Order, (3) if, for any reason, DEC believes that it will be unable to complete the process and issue a SPDES permit to Defendants within this time frame, DEC is to inform the Court and the parties to this action in writing as to the reason for any delay as soon as DEC realizes that there will be a delay, (4) Defendants are to provide the Court and opposing counsel, on the first day of each month, beginning March 1, 2003 and continuing until such time as they obtain a SPDES permit, with a written status report as to the progress they have made towards obtaining a SPDES permit and any other measures Defendants have made toward reducing the turbidity of the water being discharged through the Shandaken Tunnel, and (5) Defendants are to notify the Court and opposing counsel in writing when they receive a SPDES permit and are to file a copy of this permit with the Court; and the Court further

ORDERS that Plaintiffs are to file and serve their application for attorneys' fees and costs to the Court within ten days of the date of this Order pursuant to § 1365(d); and the Court further

ORDERS that Defendants are to file and serve any objections they have to Plaintiffs' application for attorneys' fees and costs no later than fourteen days after service of the application upon them; and the Court further

ORDERS that the Clerk of the Court is to enter judgment in favor of Plaintiffs and to close this case.

IT IS SO ORDERED.

Dated: February 6, 2003
Syracuse, New York

s/_____
Frederick J. Scullin, Jr.
Chief United States District Judge

ORDER AND AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DATED OCTOBER 23, 2003

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

Plaintiff(s),

1:00-CV-511 (FJS/RFT)

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant(s).

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APPEARANCES
PACE ENVIRONMENTAL LITIGATION CLINIC, INC.
78 North Broadway
White Plains, New York 10603
Attorneys for Plaintiffs

OF COUNSEL
KARL S. COPLAN, ESQ.
DANIEL E. ESTRIN, ESQ.

CITY OF NEW YORK OFFICE OF CORPORATION COUNSEL 100 Church Street New York, New York 10007-2601 Attorneys for Defendants City of New York and New York City Department of Environmental Protection	**HILARY M. MELTZER, ESQ.** **WILLIAM S. PLACHE, ESQ.**
OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL New York State Department of Law -- Environmental Protection Bureau The Capitol Albany, New York 12204 Attorneys for Defendants Joel A. Miele, Sr., State of New York, New York State Department of Environmental Conservation and Erin M. Crotty	**JAMES M. TIERNEY, AAG**

SCULLIN, Senior Judge

ORDER

In a Decision dated June 13, 2006, the Second Circuit Court of Appeals affirmed this Court's judgment "except as to the amount of the civil penalty imposed on the City of New York and remand[ed] the case . . . to recalculate that penalty." *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y., Dkt.* Nos. 03-7203, 03-7253, slip op. at 26.[1] Specifically, the Second Circuit noted that this Court had erroneously stated that "the maximum statutory penalty for the final 131 days of 2002 was $31,500 per day [when,] [i]n fact, the maximum daily penalty remained $27,500 until March of 2004. 40 C.F.R. § 19.4. Thus the maximum possible penalty was $62,725,000, not $63,249,000" as this Court stated. *See id.* Finally, because the Second Circuit had "no way to determine how [this Court's] calculation of the penalty would have differed, if at all, had it accurately determined

[1] The Court notes that it did not receive a copy of the Second Circuit's mandate until September 14, 2006. *See* Dkt. No. 197.

the maximum statutory penalty, [it] remand[ed] the case for recalculation of the penalty in light of the true statutory maximum." *See id.*

In the Memorandum-Decision and Order, upon which the judgment was based, this Court determined that "the Shandaken Tunnel was in operation for a total of 2,326 days during [the period from February 1, 1995 and December 31, 2002]" and "calculated the maximum civil penalt[y]" to be $63,249,000. *See* Memorandum-Decision and Order, dated February 6, 2003, at 10. This Court then adjusted that figure after considering the six factors set forth in 33 U.S.C. § 1319 and concluded that "no civil penalties should be assessed against Defendants for any violations occurring prior to June 22, 2002[,] thus requir[ing] that the Court subtract $57,500,5002[2] from the maximum allowable penalty to arrive at the final figure of $5,749,000." *See id.* at 19.

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[2] The Court notes that it actually subtracted **$57,000,000** ***not*** $57,500,500 from the maximum statutory penalty of $63,249,000 to arrive at the final figure of $5,749,000.

Upon remand, the Court has reviewed its adjustments in light of the correct maximum statutory penalty of $62,725,000, and concludes that there is no reason to alter its decision not to assess civil penalties against Defendants for any violations prior to June 22, 2002. Thus, the Court subtracts $57,500,000 from the maximum allowable penalty of $62,725,000 to arrive at the final figure of **$5,225,000**.[3]

Accordingly, the Court hereby

ORDERS that the Clerk of the Court amend the judgment in this case to reflect that Defendants are liable for civil penalties in the amount of **$5,225,000** pursuant to

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[3] The Court calculated the total civil penalty of $5, 225,000 as follows:

June 22-30, 2002	9 days
July 2002	31 days
August 2002	31 days
September 2002	30 days
October 2002	28 days
November 2002	30 days
December 2002	31 days
Total	190 days * $27,500 per day = $5,225,000

33 U.S.C. § 1319(d). The judgment remains the same in all other respects.

IT IS SO ORDERED.

Dated: October 23, 2006
Syracuse, New York

s/_____
Frederick J. Scullin, Jr.
Senior United States District Court Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., ET AL

vs.

THE CITY OF NEW YORK, ET AL

****AMENDED ****
JUDGMENT IN A CIVIL CASE

CASE NO.
1:00-CV-511

____ **JURY VERDICT.** This action came before this Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__XX__ **DECISION BY COURT.** This action came to trial of hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants are liable for civil penalties in the amount of **$5,225,000.00,** pursuant to 33 USC § 1319(d).

In accordance with Judge Scullin's Order filed on October 23, 2006.

Dated: October 23, 2006

Clerk of Court

s/ A. Topa
By: Deputy Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 25, 2006

REPRODUCED FOLLOWING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT, FILED AUGUST 25, 2006
ROSEANN B. MACKECHNIE, CLERK

Date:

Docket Number:	03-7203-cv
Short Title:	Catskill Mountains v. City of New York
DC Docket Number:	00-cv-511
DC:	NDNY (ALBANY)
DC Judge:	Honorable Frederick Scull

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 25th day of August two thousand six.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FYLFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC. and RIVERKEEPER, INC.,

Plaintiffs-Appellees-Cross-Appellants

v.

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants-Third-Party-Plaintiffs-Appelants-Cross-Appellees.

JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Defendant-Appellant-Cross-Appellee,

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Third-Party-Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants City of New York, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: s/_____
Motion Staff Attorney

RELEVANT PROVISIONS OF FEDERAL WATER POLLUTION CONTROL ACT

REPRODUCED FOLLOWING

Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (the "Clean Water Act")

Relevant Provisions

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act –

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and

implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States. It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries. It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer 33 USCS §§ 1251 et seq. Except as otherwise

expressly provided in this Act, the Administrator of the Environmental Protection Agency (hereinafter in this Act called "Administrator") shall administer this Act.

(e) Public participation in development, revision, and enforcement of any regulation, etc. Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing 33 USCS §§ 1251 et seq. It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water. It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved--

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly

owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act;

(B) [Repealed]

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three

years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3) (A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 402(a)(1) in a permit issued after enactment of the Water Quality Act of 1987 [enacted Feb. 4, 1987], compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Review; revised standards; publication.

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2) (A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 307(a)(1) of this Act for which criteria have been published under section 304(a), the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such

toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 304(a)(8). Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this Act, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this Act, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved--

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this Act.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluvient limitations revision.

(1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of

shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

§ 1314. Information and guidelines

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution. The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 208 of this Act, within one year after the effective date of this subsection [effective Oct. 18, 1972] (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from--

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

(b) Civil actions. The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties.

(1) Negligent violations. Any person who--

(A) negligently violates section 301, 302, 306, 307, 308, 311(b)(3), 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 402 of this Act by the Administrator or a State;

shall be punished by a fine of not less than $ 2,500 nor more than $ 25,000 per day of violation, or by

imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $ 50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations. Any person who--

(A) knowingly violates section 301, 302, 306, 307, 308, 311(b)(3), 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 402 of this Act by the Administrator or a State;

shall be punished by a fine of not less than $ 5,000 nor more than $ 50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $ 100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment.

(A) General rule. Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 311(b)(3),

318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $ 250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $ 1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions. For the purpose of subparagraph (A) of this paragraph--

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury--

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of--

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements. Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $ 10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $ 20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset. For purposes of this subsection, a single operational upset

which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person". For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 502(5) of this Act, any responsible corporate officer.

(7) Hazardous substance defined. For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of this Act, (B) any element, compound, mixture, solution, or substance designated pursuant to section 102 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of this Act, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act.

(d) Civil penalties; factors considered in determining amount. Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, or in a permit issued under section 404 of this Act by a State[,], or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $ 25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic

benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applic[illegible] requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3,

1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction

may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each

application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being

introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

§ 1361. Administration

(a) Authority of Administrator to prescribe regulations. The Administrator is authorized to prescribe such regulations as are necessary to carry out the functions under this Act.

§ 1362. Definitions

Except as otherwise specifically provided, when used in this Act:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of

the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) " sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does

not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D--Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) Coastal recreation waters.

(A) In general. The term "coastal recreation waters" means--

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) Exclusions. The term "coastal recreation waters" does not include--

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) Floatable material.

(A) In general. The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) Inclusions. The term "floatable material" includes--

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) Pathogen indicator. The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

(24) Oil and gas exploration and production. The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

§ 1370. State authority

Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

NOTICE OF PROPOSED RULEMAKING

REPRODUCED FOLLOWING

Federal Register/ Vol. 71, No. 109/ Wednesday, June 7 2006/ Proposed Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[EPA-HQ-OW-2006-0142; FRL-8180-7]

RIN 2040-AE86

National Pollutant Discharge Elimination System (NPDES) Water Transfer Proposed Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing an amendment to its Clean Water Act (CWA) regulation to expressly exclude water transfers from regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program. The proposed rule would define water transfers as an activity that conveys waters of the United States to another waster of the United States without subjection the water to intervening industrial, municipal, or commercial use. This proposed rule focuses exclusively on water transfers and is not relevant to whether any other activity is subject to the CWA permitting requirement.

DATES: Comments must be received on or before July 24, 2006.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2006-0141 by one of the following methods:

(1) Federal eRulemaking Portal: *http://www.regaulations.gov*. Follow the on-line instructions for submitting comments. EPA prefers to receive comments submitted electronically.

(2) E-mail: *ow-docket@epa.gov*, Attention Docket ID No. EPA-HQ-OW-2006-0141.

(3) Mail: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mailcode 4203M, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA-HQ-OW-2006-0141.

(4) Hand Delivery: Deliver your comments to : EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. EPA-HQ-OW-2006-0141. Such deliveries are only accepted during the Docket's normal hours of operation and special arrangements should be made.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OW-2006-0141. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at http://www.regualtions.gov, including any personal information provided, unless the comment include information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov Web sites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment

and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the regulations index at *http:/www.regulations.gov/*. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at http://www.regulations.gov or in hard copy at the Water Docket in the EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading room is open from 8:30 am. To 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

FOR FURTHER INFORMATION CONTACT: For additional information contact Jeremy Arling, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number" 20564-2218, e-mail address: arling.jeremy@epa.gov.

SUPPLEMENTARY INFORMATION:

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I. National Technology Transfer and Advancement Act

I. General Information

A. Does This Action Apply to Me?

This action applies to those involved in the transfer of waters of the United States. The following table provides a list of standard industrial codes for operations covered under this revised rule.

Category	NAICS	Example of potentially affected entities
Resource management parties (includes state departments of fish and wildlife, state departments	924110 Administrati Resource and Soli Programs.	Government establishments primarily engaged in the administration, regulation, and enforcement of water resource programs; the

of pesticide regulations, state environmental agencies, and universities).		administration and regulation of water pollution control and prevention programs; the administration and regulation of drainage development and water resource consumption programs; and coordination of these activities at intergovernmental levels.
	924120 Administration of Conservation Programs.	Government establishments primarily engaged in the administration, regulation , supervision and control of land use, including recreational areas; conservation and preservation of natural resources; erosion control; geological survey program administration; weather forecasting program administration; and the administration and protection of publicly and privately owned forest lands. Government establishments responsible for planning,

		management, regulation and conservation of game, fish, and wildlife populations, including wildlife management areas and field stations; and other administrative matters relation to the protection of fish, game, and wildlife are included in this industry.
	237110 Water and Sewer Line and Related Structures Construction.	This category includes entities primarily engaged in the construction of water and sewer lines, mains, pumping stations, treatment plants and storage tanks.
	237990 Other Heavy and Civil Engineering Construction.	This category includes dam Construction and management, flood control structure construction, drainage canal and ditch construction, flood control project construction, and spillway, floodwater, construction.
Public Water Supply	221310 Water Supply	This category includes entities engaged in operating water treatment plants and/or operating water supply systems. The water supply system may include pumping

		stations, aqueducts, and/or distribution mains. The water may be used for drinking, irrigation, or other uses.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be regulated. EPA welcomes comment identifying those other entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the proceeding **FOR FURTHER INFORMATION CONTACT** section.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting Confidential Business Information.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CRF part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

i. Identity the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulation (CFR) part or section number.

iii. Explain why you agree or disagree; suggest

alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at you r estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. explain your views as clearly as possible.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

Water transfers occur routinely and in many different contexts across the United States. Typically, water transfers route water through tunnels, channels and/or natural stream water features, and either pump or passively direct it for uses such as providing public water supply, irrigation, power generation, flood control, and environmental restoration. Water transfers can be relatively simple, moving a small quantity of water a short distance on the same stream, or very complex, transporting substantial quantities of water over long distances, across both state and basin boundaries. There are thousands of water transfers currently in major diversion projects in the western States alone. Examples include the Colorado-Big Thompson Project in Colorado and the Central Valley Project in California.

Water transfers are administered by various federal, State, and local agencies and other entities. The Bureau of Reclamation administers significant transfer in western States to provide approximately 140,000 farmers with irrigation water transfers, the Army Corps of Engineers keeps thousands of acres of agricultural and urban land in southern Florida from flooding in former areas of Everglades wet lands. Many large cities in the west and

the east would not have adequate sources of water for their citizens were it not for the continuous redirection of water form outside basins. For example, both the cities of New York and Los Angeles are dependent on water transfers form distant watersheds to meet their municipal demand. In short, numerous States, localities, and residents are dependent upon water transfers, and these transfers are an integral component of U.S. infrastructure.

Although there have been a few isolated instances where entities responsible for water transfers have been issued NPDES permits, EPA is aware of only one State that has a practice of issuing NPDES permits for water transfers.[1] Water transfers are not generally subject to section 402 of the Clean Water Act. However, the Act reserves the ability of States to regulate water transfers under State law and this proposed rulemaking does not affect this state prerogative. *See* **CWA** section 510.

The question of whether or not an NPDES permit is required for water transfers has arisen because activities that result in the movement of waters of the U.S., such as trans-basin transfers of water to serve municipal, agricultural, and commercial needs, can also move pollutants from one waterbody (donor water) to another (receiving water). The Supreme Court recently discussed this issue in South Fla. Water Mgmt. Dist. F. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), leaving the matter unresolved. In this case, the Supreme Court vacated a decision by the 11th Circuit, which had held that a Clean Water Act permit was required for transferring water from

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[1] For instance, courts required NPDES permits for water transfers associated with the expansion of a ski resort and the supply of drinking water. See Dubois v. United States Dept. of Ag., 103 F.3d 1273 (1st Cir 1996) and Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2nd Cir 2001). Pennsylvania began issuing permits for water transfers in 1986, in response to a State court decision mandating the issuance of such permits. DELAWARE Unlimited v. DER, 508 A.2d 348 (Pa Cmwlth, 1986).

one navigable water form on navigable water into another, a Water Conservation Area in the Florida Everglades. The Court remanded the case for further fact-finding as to whether the two waters in question were "meaningfully distinct." If they were not, no permit would be required. The Court declined to address legal arguments made by these legal issues in an administrative document. 541 U.S. at 107.

On August 5, 2005, EPA issued a legal memorandum entitled "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water transfers." (interpretive memorandum) The precise legal question addressed in the interpretive memorandum was whether the movement of pollutants potentially subjecting the activity to the permitting requirement under section 402 of the Act. Based on the statute as a whole and consistent with the Agency's longstanding practice, the interpretive memorandum concluded that Congress intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA.

Today, EPA is proposing an amendment to its Clean Water Act (CWA) regulations to expressly exclude water transfers from regulation under section 402 of the CWA. The proposed rule would define water transfers as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use. This proposed rule focuses exclusively on water transfers and is not relevant to the CWA permitting requirement.

This proposed rule is organized as follows. Section III discusses the rationale for this exclusion, based on the language, structure, and legislative history of the Clean Water Act; section IV describes the scope of this proposed rule; and section V describes "designation authority" as an additional element that eh Agency chose not to propose but

for which the Agency is interested in receiving public comment.

III. Rationale

As stated in EPA's August 5th interpretive memorandum (available at Docket No. EPA-HQ-OW-2006-0141), based on the CWA as a whole, the Agency concludes that Congress intended to leave the oversight of water transfers to authorities other than the NPDES programs. This proposed rule is based on the legal analysis contained in the interpretive memorandum and explained below.

Statutory construction principles instruct that the Clean Water Act should be interpreted by analyzing the statute as a whole. *United State v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850). The Supreme Court has long explained "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." *Id. see also, Gustafond v. alloyd Co., Inc.*, 513 U.S. 561,570 (1995), *Smith v. United State Nat'l Bank of Or. V. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). In general, the "whole statute" interpretation analysis means that "a statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." Norman J. Singer, Statutes and Statutory Construction vol. 2A § 46:05, 154 (6th ed., West Group 2000). As the Second Circuit has explained with regard to the CWA:

Although the canons of statutory interpretation provide a court with numerous avenues for supplementing and narrowing the possible meaning of ambiguous text, most helpful to our interpretation of the CWA in this case are two rules. First, when determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure [quoting *United*

States v. Dauray, 215 F3d 257,262 (2d Cir. 2000)]. Second, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with. *United State v. Turkette*, 452 U.S. 576, 580 (1981).

Natural Res. Def. Council v. Muszynski, 268 F.3d 91, 98 (2d Cir. 2001). See also, Singer, vol. 3B § 77:4, at 256-258.

A holistic approach is needed her in particular because the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's water. The purpose of the CWA is to protect water quality. Congress nonetheless recognized that programs already existed at the State and local levels for managing water quantity, and it recognized the delicate relationship between the CWA and State and local programs. Looking at eh statute as a whole is necessary to ensure that the analysis here is consonant with Congress' overall policies and objectives in the management and regulation of the nation's water resources.

The analysis below addresses in turn the statutory language and structure and the legislative history.

A. Statutory Language and Structure

The Clean Water Act prohibits the discharge of a pollutant by any person except in compliance with specified statutory sections, including section 402. CWA section 301(a). The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." CWA section 502(12). Where discharges of pollutants occur, they are generally regulated by a permit under the NPDES program. Discharges of pollutants other than dredged or full material may be authorized by permits issued under section 402 by EPA or States with approved permitting programs. Discharges of dredged or fill material may be authorized by permits issued by Army Corps of Engineers and authorized by permits and authorized States under section

404, and that provision is not addressed or affected by this Agency interpretation.

While no one provision of the Act expressly addresses whether water transfers are subject to the NPDES programs, the specific statutory provision addressing the management of water resources—coupled with the overall statutory structure—support the conclusion that Congress did not intend for water transfers to be regulated under section 402. The Act establishes a variety of programs and regulatory initiatives in addition to the NPDES permitting program. It also recognizes that the States have primary responsibilities with respect to the "development and use (including restoration, preservation, and enhancement) of land and water resources." CWA section101(b).

Congress also made clear that the Clean Water Act is to be construed in a manner that does not unduly interferer with the ability of States to allocate water within their boundaries, stating:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be supersede or abrogate or otherwise impaired by [the Act]. It is the further policy of Congress that nothing in the chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water sources.

CWA section 101(g) does not prohibit EPA from taking actions under the CWA that it determines are needed to protect water quality,[2] it nonetheless establishes Congress

[2] PUD No. 1 of Jefferson County v. Wash. State Dep't. of Ecology. 511 U.S. 700, 720 (1994) ("Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.")

general direction against unnecessary Federal interference with State allocations of water rights.

Water transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under State law. Because subjecting water transfers to be a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights, this section provides additional support for the Agency's interpretation that absent a clear Congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfer. See United States v. Bass, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.") A second statutory provision, section 510(2)m similarly provides:

Except as expressly provided in the Act, nothing in this Act shall * * * be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary wasters) of such States.

Like section 101(g), this provision supports the notion that Congress did not intend administration of the CWA to unduly interfere with water resource allocation.

Finally, one section of the Act 304(f)—expressly addresses water management activities. Mere mention of an activity in section 304(f) does not explicitly exempt nonpoint sources in nature. See Miccosukee at 106 (noting that section 304(f)(2)(F) does not explicitly exempt non point sources if they also fall within the definition of point source). Nonetheless, section 304(f) is focused primarily on addressing pollution sources outside the scope of the NPDES program. See H.R. Rep. No. 92-911, at 109(1972), reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972 Amendments") (emphasis added)). This section directed EPA to issued guidelines for identifying and evaluating the

nature and extent of nonpoint sources of pollutants,[3] as well as processes, procedures and methods to control pollution from, among other things, "changes in the movement, flow or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities. "CWA 304(f)(2)(F) (emphasis added).

While section 304(f) does not exclusively address nonpoint sources of pollution, it nonetheless "concern nonpoint sources" (Miccosukee, 541 U.S. at 106) and reflects an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program. This proposed rule accords with the direction to EPA and other federal agencies in section 101(g) to work with State and local agencies to develop "comprehensive solutions" to water pollution problems " in concert with programs for managing water resources."

Thus, these section of the Act together demonstrate that Congress was aware that there might be pollution associated with water management activities, but chose to defer to comprehensive solutions developed by state and local agencies for controlling such pollution. Because the NPDES program only focuses on water pollution from point source discharges, it is not the kind of comprehensive program that Congress believed was best suited to addressing pollution that may be associated with water transfers.

In contrast with these provisions of the statute which

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[3] Sources not regulated under sections 402 or 404 are generically referred to as "nonpoint sources." See National Wildlife Fed'n v. Consumers Power Co., 862 F. 2d 580, 582 (6th Cir. 1988) ("nonpoint source" is shorthand for and "includes all water quality problems not subject to section 402") (quoting Natinal Wildlife Fed'n v. Gorsuch. 693 F.2d 156, 166)(D.C. Cir. 1982) (internal quotation marks omitted)).

expressly address water management activities, the general prohibition and definition sections of the statute do not explicitly discuss water management. Section 301(a) of the Act proscribes "the discharge of any pollutant by any person" except in compliance with specified sections of the CWA section 502(12). While the statute 101(g), 102(b), 304(f) and 510(2) provide a strong indication that the term "addition" with those more specific sections of the statute. In light of Congress' clearly expressed policy not to unnecessarily interfere with water resource allocation and its inclusion of changes in the movement, flos or circulation of any water of the U.S. in a section of the Act addressing sources of pollutants that would not be subject to regulation under section 402, it is reasonable to interpret "addition" as not generally including the mere transfer of waters from one water of the U.S. to another.

The overall structure of the statute further supports this conclusion. In several important ways, water transfers are unlike the types of discharges that were the primary focus of Congressional attention in 1972. Discharges of pollutants covered by section 402 are subject of "effluent" limitations. Water transfers, however, are not like effluent from and industrial, commercial or municipal operation. Rather than discharge effluent, water transfers release one water of the U.S. into another.

The operators of water control facilities are generally not responsible for the presence of pollutants in the waters they transport. Rather, those pollutants often enter "the waters of the United States" through point and nonpoint sources located far from those facilities and beyond control of the project operators. Congress generally intended that pollutants be controlled at the source whenever possible. See S. Rep. No. 92-414, p. 77 (1972) (justifying the broad definition of navigable waters because it is "essential that discharges of pollutants be controlled at the source").[4] The

[4] Recognition of a general intent to control pollutants at the source does not mean that dischargers are responsible only or pollutants that they

pollutants in transferred waters are more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source. See, e.g., CWA section 102(b) (reservoir planning); CWA section 208(b)(2)(F) (land use planning to reduce agricultural nonpoint sources of pollution); CWA section 319 (nonpoint source management programs); and CWA section 401(state certification of federally licensed projects). Congress acknowledged this when it directed Federal agencies to co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water sources.

The Agency, therefore, concludes that, taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress did not generally intend to subject water transfers to the NPDES program. Rather, Congress intended to leave oversight of water transfers to water resource management agencies and the States in cooperation with Federal authorities.

B. Legislative History

The legislative history of the Clean Water Act also supports this conclusion. First, the legislative history of section 101(g) reveals that "(i)t is the purpose of this (provision) to insure that state [water] allocation system are not subverted." 3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95-14, A Legislative History of the Clean Water Act of 1977, at 532 (1978); see PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700,721 (1994).

Notably, the legislative history of the Act discusses water

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generate; rather, point sources need only convey pollutants into navigable waters to be subject to the Act. See Miccosukee at 105. Municipal separate storm sewer systems, for example are clearly subject to regulation under the Act. CWA section 402(p).

flow management activities only in the context of the nonpoint source program. In discussing section 304(f), the House Committee Report specifically mentioned water flow management as an area where EPA would provide technical guidance to States for their nonpoint source programs, rather than an area to be regulated under section 402.

This section and the information on such nonpoint sources is among the most important in the 1972 Amendments. * * * natural and manmade changes in the normal flow of surface and ground waters.

H.R. Rep. No. 92-911, at 109 (1972) (emphasis added).

In the legislative history of section 208 if the Act, the House Committee report noted that in some States, water resource management agencies allocating stream flows are required to consider water quality impacts. The Report stated:

[I]n some States water resource development agencies are responsible for allocation of stream flow and are required to give full consideration to the effects on water quality. To avoid duplication, the Committee believes that a State which has an approved program for the handling of permits under section 402, and which has a program for water resource allocation should continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system.

H.R. Rep. No. 92-911, at 96 (1972).

Thus, Congress recognized that he new section 402 permitting program was not the only viable approach of addressing water quality issues associated with State water resource management. The legislative history makes clear that Congress did not intend a wholesale transfer of responsibility for water quality away from water resource agencies to the NPDES authority. Rather, Congress encouraged States to obtain approval of authority to

administer the NPDES program under section 402(b) so that the NPDES program could work in concert with water resource agencies' oversight of water management activities to ensure a "balanced management control system" Id.

C. Conclusion

In sum, the language, structure, and legislative history of the statute all support the conclusion that Congress did not intend to subject water transfers to the NPDES program. Water transfers are an integral part of water resource management; they embody how State nation's water resources and balance competing needs for water. Water transfers also physically implement State regimes for allocating water rights, many of which existed long before enactment of the Clean Water Act. Congress was aware of those regimes, and did not want to impair the ability of these agencies to carry them out. Finding the NPDES program generally inapplicable to water transfers is true to this intent and the structure of the Clean Water Act, and gives meaning to sections 101(g) and 304(f) of the Act.

IV. Scope of This Proposed Rule

This proposed rule would expressly exclude discharges from water transfers from requiring an NPDES permit. The rule would define a water transfer as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use. Waters of the U.S. are defined for purposes of the NPDES program in the Code of Federal Regulations in § 122.2.

A water transfer occurs between two "waters of the United States." Accordingly, the movement of water through a dam is not a water transfer because the dam merely conveys water from one location to another within the same waterbody. However, in both cases (water transfers between distinct water bodies and movement of

waters within the same waterbody), an NPDES permit is not required because no "addition" of a pollutant has occurred.

Water transfer facilities should be able to be operated an maintained in a manner which ensures that they do not add pollutants to the water being transferred. If no pollutants are added, a permit would not be required. However, where these point sources do add pollutants to water passing through the structure into the downstream water, NPDES permits are required. *Consumer Power*, 862 F.2d at 588; *Gorsuch*, 693 F.2d at 165, n. 22. Nothing in this rulemaking affects EPA's longstanding approach to regulation of such discharges under section 402.

This proposed rule would not affect EPA's longstanding position that, if water is withdrawn form waters of the U.S. for an intervening industrial, municipal or commercial use, the reintroduction of the intake water and associated pollutants is an "addition" subject to NPDES permitting requirements. EPA has long imposed NPDES requirements on entities that withdraw process water or cooling water and then return some or all of the water through a point source. See, e.g., 40 CFR 122.2 (definition of process wastewater); 40 CFR 125.80-125.89 (regulation of cooling towers); 40 CFR 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 CFR part 132, Appendix F, Procedure 5-D (containing regulation governing water quality-based permitting for intake pollutants in the great Lakes). Moreover, a discharge form a waste treatment system, for example, to a water of the United States, would not constitute a water transfer (and would require an NPDES permit). See 40 CFR 122.2. These situations are distinguished from the water transfers that are the subject of this notice because if water is withdrawn form navigable waters for an intervening industrial, municipal or commercial use, the reintroduction of the intake water and associated pollutants physically introduces pollutants from

the outside world into navigable waters and, therefore, is an "addition " subject to NPDES permitting requirements. The fact that some of the pollutants in the discharge may have been present in the source water does not remove the need for a permit, although, under some circumstances, permittees may receive "credit" in their effluent limitations for such pollutants. See, 40 CFR 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 CFR part 132, Appendix F, Procedure 5-D (containing regulations governing water quality-based permitting for intake pollutants in the Great Lakes).

Similarly, an NPDES permit is normally required if a facility withdraws water form a water of the U.S., removes preexisting pollutants to purify the water, and then discharges the removed pollutants (perhaps in concentrated form) back into the water of the U.S. while retaining the purified water for use in the facility. An example of this situation is drinking water treatment facilities, which withdraw water from streams, rivers, and lakes. The withdrawn water typically contains suspended solids, which must be removed to make the water potable. The removed solid are a waste materials from the treatment process and, if discharged into waters of the U.S., are subject to NPDES permitting requirements, even though that waste material originated in the withdrawn water. See, e.g., In re City of Phoenix, Arizona Squaw Peak & Deer Valley Water Treatment Plants, 9 E.A.D. 515, 2000 WL 1664964 (EPA Envtl. App. Bd. November 1, 2000) (rejecting, on procedural grounds, challenges to NPDES permits for two drinking water treatment plants that draw raw water from the Arizona Canal, remove suspended solids to purify the water, and discharge the solids back into the Canal; Final NPDES General Permits for two drinking water, and discharge the solids back into the Canal; Final NPDES General Permits for Water Treatment Facility Discharges in the State of Massachusetts and New Hampshire, 65 FR 69,000 (2000) (NPDES permits for

discharges of process wastewaters from drinking water treatment plants).

Waters that are diverted and used for irrigation and then reintroduced to the waters of the U.S. are exempt from permitting requirements under the exemption for return flows from irrigates agriculture from the definition of "point source" in section 502(14) and this Agency interpretation does not affect that exemption.

The activities addressed by this proposed rule also stand in sharp contrast to other activities the have long been subject to the Clean Water Act's permitting requirements. For example, section 402 subjects placer mining of ore deposits in streams and rivers to the NPDES permitting program because the process results in the excavation and point source discharge of dirt and gravel into waters of the U.S. See Rybachek v. EPA, 904 F.2d 1276, 1285 (9th Cir. 1990). Similarly, section 404 of the Clean Water Act subjects the deposit or redeposit of dredged or fill material to a specialized permitting program because that activity results in the point source discharge of those materials into navigable waters. See CWA section 404; United States v. Deaton, 209 F.3d 331, 335-336 (4th Cir. 200); United States. M.C.C. of Fla., Inc., 772 F.2d 1501, 1503-1506 (11th Cir. 1988); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923-925 (5th Cir.1983). The Clean Water Act also clearly imposes permitting requirements on publicly owned treatment works, and large and medium municipal separate strom sewer systems. See CWA sections 402(a), 402(p)(1)-(4). Congress amended the Clean Water Act in 1987 specifically to add new section 402(p) to better regulate stormwater discharges from point sources. Water Quality Act of 1987, Public Law 100-4, 101 Stat. 7 (1987). Again, this interpretation does not affect EPA's longstanding regulation of such discharges.

This proposed rule also would not change EPA's longstanding position, upheld by the Supreme Court in Miccosukee, that the definition of "discharge of a

pollutant" in the CWA includes coverage of point sources that do not themselves generate pollutants. The Supreme Court stated, "A point source is, by definition, a 'discernible, confined, and discrete conveyance' Section 1362(14) (emphasis added). That definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.' Section 1362(7)." Miccosukee, 541 U.S. at 105.

EPA solicits comment on the proposed definition of a water transfer. Does the definition properly achieve the Agency's objective of excluding water transfers from NPDES permitting (as intended by Congress) while affirming section 402 jurisdiction over all other currently regulated activities? Does the proposed rule clearly distinguish between situations where the water transfer facility "adds" pollutants to the water being transferred and thus must obtain a permit, and those situations where waters merely pass through the facility without the addition of any pollutant?

V. Designation Authority

EPA considered, but ultimately did not propose, an additional provision allowing States to designate particular water transfers as subject to the NPDES program on a case-by-case basis. EPA did not select this option but is seeking comment on it.

Under this approach, the permitting authority would have the discretion to issue a permit on a case-by-case basis if a transfer would cause a significant impairment of a designated use and no State authorities are being implemented to adequately address the problem. A significant impairment would occur when, as a result of the water transfer, the designated use of the receiving water could no longer be maintained. This designation would be at the sole discretion of the State NPDES authority, and

would only apply in States authorized to implement the section 402 program.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action." As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. This proposed rulemaking would expressly exclude discharges from water transfers

from requiring an NPDES permit. This rule does not seek to require potentially affected entities to generate, maintain, or disclose information to or for a Federal agency and therefore would not impose any information collection burden.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small

business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a governmental jurisdiction that is a government of a city, county, town, school district or special district with a or population of less than 50,000: and (3) a small organization that is any not-for profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant adverse economic impact on a substantial number of small entities. Because EPA is simply codifying the Agency's longtime position that Congress did not generally intend for the NPDES program to regulate the transfer of waters of the United States into another water of the United States, this proposed action will not impose any requirement on small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do

not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal Intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposed rule would not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. EPA is proposing to simply codify the Agency's longtime position that Congress did not generally intend for the NPDES program to regulate the transfer of a water of the United States into another water of the United States. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reason, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's proposed rule is not subject to the requirements of section 203 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an

accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6(b) of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. Under section 6(c) of Executive Order 13132, EPA may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

EPA has concluded that this proposed rule does not have Federalism implications. It will not have substantial

direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's proposed rule does not change the relationship between the government and the States or change their roles and responsibilities. Rather, this proposed rulemaking would confirm the Agency's longstanding practice that Congress generally intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA. In addition, EPA does not expect this rule to have

any impact on local governments.

Further, the revised regulations would not alter the basic State-Federal scheme established in the Clean Water Act under which EPA authorizes States to carry out the NPDES permitting program. EPA expects the revised regulations to have little effect on the relationship between, or the distribution of power and responsibilities among, the Federal and State governments. Thus, Executive Order 13132 does not apply to this rule.

Consistent with EPA policy, EPA nonetheless consulted with representatives of State governments early in the process of developing the proposed regulation to permit them to have meaningful and timely input into its development. EPA asked States for data regarding the number of water transfers within their jurisdiction and the mechanisms under State law that could be utilized to address any possibly adverse water quality impacts from those transfers. In considering the designation authority provision, EPA also sought data from the States regarding their use of similar authorities in their stormwater phase II and Concentrated Animal Feeding Operations (CAFO) rules. In addition to data collection, EPA sought States' opinions on water transfers generally, and designation, specifically. States varied in their concerns, with some opposed to NPDES permitting for water transfers and some supportive of an ability to use it.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled, "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an

accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Today's proposed rule would clarify that Congress did not generally intend for the NPDES program to regulate the transfer of waters of the United States into another water of the United States. Nothing in this rule would prevent an Indian Tribe from exercising its own organic authority to deal with such matters. Thus, Executive Order 13175 does not apply to this rule.

In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive *Order 13045: Protection of Children From Environmental Health and Safety Risks*

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the

environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This regulation is not subject to Executive Order 13045 because it is not economically significant as defined under E.O. 12866, and because the Agency does not have reason to believe that it addresses environmental health and safety risks that present a disproportionate risk to children. Today's proposed rule would simply clarify Congress's intent that water transfers generally be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule would not be subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not an economically significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTFAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adapted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not

to use available and applicable voluntary consensus standards. This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Dated: June 1, 2006.

Stephen L. Johnson,

Administrator.

For the reasons set forth in the preamble, 40 CFR part 122 is proposed to be amended as follows:

PART 122-EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

I. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Ad, 33 U.S.G. 1251 *et seq.*

2. Section 122.3 is amended by adding paragraph 6) to read as follows:

§122.3 Exclusions.

* * * * *

(i) *Discharges from a water transfer.* Water transfer means an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants added by

the water transfer activity itself to the water being transferred.

[FR Doc. E6-8814 Filed 6--6--08; 8:45 am]

BILLNG CODE 6560-50-P

EPA INTERPRETATIÓN

REPRODUCED FOLLOWING

UNITED STATE ENVIRONMENTAL PROTECTION AGENCY
Washington, D. C. 20460

SUBJECT: Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers

FROM: Ann R. Klee
General Counsel

Benjamin H. Grumbles
Assistant Administrator for Water

TO: Regional Administrators

This Agency interpretation addresses the question of whether the National Pollutant Discharge Elimination System (NPDES) permitting program under Section 402 of the Clean Water Act (CWA) is applicable to water control facilities that merely convey or connect navigable waters. For purposes of this Agency interpretation, the term "water transfer" refers to any activity that conveys or connects navigable waters (as that term is defined in the CWA) without subjecting the water to intervening industrial, municipal, or commercial use. This interpretation focuses exclusively on water transfers and is not relevant to whether any other activity is subject to the CWA permitting requirement.[1]

[1] Section VI, below, discusses activities that are beyond the scope of, and not affected by, this Agency interpretation.

I. Overview

The question of whether or not an NPDES permit is required for water transfers has arisen because activities that result in the movement of navigable waters, such as trans-basin transfers of water to serve municipal, agricultural, and commercial needs, can also serve to move pollutants from one waterbody (donor water) to another (receiving water). The Supreme Court recently addressed this issue in South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), leaving the matter unresolved.[2]

The precise legal question addressed here is whether the movement of pollutants from one navigable water to another by a water transfer is the "addition" of a pollutant potentially subjecting the activity to the permitting requirement under section 402 of the Act.[3] The

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[2] In this case, the Supreme Court vacated a decision by the 11th Circuit, which had held that a Clean Water Act permit was required for transferring water from one navigable water into another, a Water Conservation Area in the Florida Everglades. The Court remanded the case for further fact-finding as to whether the two waters in question were "meaningfully distinct." If they were not, no permit would be required. The Court declined to address legal arguments made by the parties because the arguments had not been raised in the lower court proceedings. The Court noted that EPA had not spoken to these legal issues in an administrative document. 541 U.S. at 107.

[3] The Clean Water Act prohibits the discharge of a pollutant by any person except in compliance with specified statutory sections, including section 402. CWA § 301(a). The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12). Discharges of pollutants other than dredged or fill material may be authorized by permits issued under section 402 by EPA or States with approved permitting programs. Discharges of dredged or fill material may be authorized by permits issued by the Army Corps of Engineers and authorized States under section 404, and that provision is not addressed or affected by this Agency interpretation.

question touches on the delicate balance created in the statute between protection of water quality to meet federal water quality goals, and the management of water quantity left by Congress in the hands of States and water resource management agencies. The issue also requires consideration of how the statute divides responsibility between the federal and State governments for controlling sources of water pollution. As a matter of longstanding Agency practice, EPA has not issued NPDES permits for mere water transfers; nor has it ever stated in any general policy or general guidance that an NPDES permit is required for such transfers.[4] However, to date, the Agency's position has not been fully articulated in an administrative documents.[5]

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[4] The Agency has itself issued a permit on one occasion in response to the 1st Circuit's decision in Dubois v. U.S. Dep't. of Agric., 102 F.3d 1273 (1st Civ. 1996)(requiring a permit for a ski resort's snowmaking activities), discussed further below.

[5] The Supreme Court in Miccosukee noted that in an Office of General Counsel Opinion the Agency had reached the conclusion that irrigation ditches that discharge to navigable waters require NPDES permits even if they themselves qualify as navigable waters. 541 U.S. at 107. (citing In re Riverside Irrigation Dist. Op. No. 21, (EPA Off. Gen. Counsel, June 27, 1975), 1975 WL 23864. That opinion did not specifically address the question of whether an "addition" has occurred when a navigable water is merely conveyed to another navigable water. Instead, the specific issue that opinion addressed was whether "irrigation return flow [is] a properly permittable [point] source within the meaning of sections 301 and 402 of the [Clean Water] Act." Riverside, 1975 WL 231864 at *1. While the opinion answered that question in the affirmative, amendments to the Clean Water Act in 1977 and EPA's implementing regulations have exempted "return flows from irrigated agriculture" from regulation under the CWA. CWA § 402(1)(1)("The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture."); CWA § 502(14)("This term [point source] does not include agricultural stormwater discharges and return flows from irrigated agriculture."); and 40 CFR § 122.3(f)("Return flows from irrigated agriculture" are excluded from NPDES program.). To the

Based on the statute as a whole, we confirm the Agency's longstanding practice and conclude that Congress intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA. Furthermore, the Agency intends to initiate a rulemaking process to address water transfers.

Because Congress did not generally intend for the NPDES program to regulate water transfers, a factual, case-specific inquiry into whether a particular water transfer constitutes an "addition" is not required. If, however, EPA were required, for example in a judicial proceeding, to make a factual determination as to whether a waterbody is "meaningfully distinct" under the Supreme Court's decision in Miccosukee, section V below, discusses relevant factors that the Agency would consider.

This Agency interpretation is organized as follows. Section II discusses relevant factual background; section III analyzes the language, structure and legislative history of the Clean Water Act; section IV discusses the relevant caselaw; section V describes factors that would be relevant in applying the term "meaningfully distinct" from the Miccosukee decision to a particular set of facts; section VI describes the scope of this interpretation; and section VII summarizes the Agency's conclusions.

II. Factual Background

Water transfers occur routinely and in many different contexts across the United States. Typically, water

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extent the 1975 Opinion, In re Riverside Irrigation Dist., conflicts with this Agency interpretation with respect to water transfers, it is superseded.

is routed through tunnels, channels, and/or natural stream water features, and either pumped or passively directed for uses such as providing public water supply, irrigation, power generation, flood control, and environmental restoration. Water transfers can be relatively simple, moving a small quantity of water a short distance on the same stream, or very complex, transporting substantial quantities of water over long distances, across both political and basin boundaries. There are thousands of water transfers currently in place in the United States, including 16 major diversion projects in the western States alone, excluding numerous projects in California. Examples of large surface water to surface water transfer projects include the Colorado-Big Thompson Project in Colorado and the Central Valley Project in California.

Water transfers are administered by various federal, State, and local agencies and other entities. The Bureau of Reclamation administers significant transfers in western States to provide approximately 140,000 farmers with irrigation water. With the use of water transfers, the Army Corps of Engineers keeps thousands of acres of agricultural and urban land in southern Florida from flooding in former areas of Everglades wetlands. Many large cities in the west and the east would not have adequate sources of water for their citizens were it not for the continuous redirection of water from outside basins. For example, both the cities of New York and Los Angeles are dependent on water transfers from distant watersheds to meet their municipal demand. In short, numerous States, localities, and residents are dependent upon water transfers and these transfers are an integral component of U.S. infrastructure.

Although there have been a few isolated instances where water transfers have been issued NPDES permits, we are aware of only one State that has a practice of issuing

NPDES permits for water transfers.[6] Although water transfers are not generally subject to section 402 of the Clean Water Act, the Act reserves the ability of states to regulate water transfers under State law. See CWA § 510.

III. Congress Intended to Leave Oversight of Water Transfer to Water Resource Management Agencies and State Non-NPDES Authorities Instead of the NPDES Program

Statutory construction principles instruct that the Clean Water Act should be interpreted by analyzing the statute as a whole. United State v. Boisdore's Heirs, 49 U.S. 113, 122 (1850). The Supreme Court has long explained "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." Id.[7] In general, the "whole statute" interpretation analysis means that "a statute is passed as a whole and not in parts or sections and is not animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." Norman J. Singer, Statutes and Statutory Construction vol. 2A § 46:05, 154 (6th ed., West Group 2000). As the Second Circuit has explained with regard to the CWA:

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[6] Pennsylvania began issuing permits for water transfers in 1986, in response to a State court decision mandating the issuance of such permits. DELAWARE Unlimited v. DER, 508 A.2d 348 (Pa. Cmwlth, 1986).

[7] *See also,* Gustafond v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995), Smith v. United States, 508 U.S. 223, 233 (1993), United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993).

> Although the canons of statutory interpretation provide a court with numerous avenues for supplementing and narrowing the possible meaning of ambiguous text, most helpful to our interpretation of the CWA in this case are two rules. First, when determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure [quoting United States v. Dauray, 215 F.3d 257, 262 (2d Cir. 2000)]. Second, 'absurd results are to be avoided and internal inconsistencies in the statute must be dealt with.' United States v. Turkette, 452 U.S. 576, 580 (1981).

Natural Res. Council v. Muszynsici, 268 F.3d 91, 98 (2d Cir. 2001). See also, Singer, vol. 3B § 77:4, at 256-258.

A holistic approach is needed here in particular because the heart of this matter is the balance Congress created between federal and state oversight of activities affecting the nation's waters. The purpose of the CWA is to protect water quality. Congress nonetheless recognized that programs already existed at the State and local levels for managing water quantity, and it recognized the delicate relationship between the CWA and state and local programs. Looking at the statute as a whole is necessary to ensure that the analysis here is consonant with Congress' overall policies and objectives in the management and regulation of the nation's water resources.

We address below in turn the statutory language and structure, the legislative history, and the relevant caselaw.

A. Statutory Language and Structure

While no one provision of the Act expressly addresses whether water transfers are subject to the NPDES program, the specific statutory provisions addressing the management of water resources - coupled with the overall statutory structure – support the conclusion that Congress did not intend for water transfers to be regulated under section 402. The Act establishes a variety of programs and regulatory initiatives in addition to the NPDES permitting program. It also recognizes that the States have primary responsibilities with respect to the "development and use (including restoration, preservation, and enhancement) of land and water resources." CWA § 101(b). The Clean Water Act expresses the understanding that, as a general matter, water control facilities that merely transport "the waters of the United States" to where they can be most beneficially used are not subject to the NPDES regime.

Congress also made clear that the Clean Water Act is to be construed in a manner that does not unduly interfere with the ability of States to allocate water within their boundaries, stating:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the Act]. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water sources.

CWA § 101(g). While section 101(g) does not prohibit EPA and States from taking actions under the CWA that they determine are needed to protect water quality,[8] it nonetheless establishes Congress' general direction against unnecessary Federal interference with State allocations of water rights. Water transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under State law. Because subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights, this section provides additional support for the Agency's interpretation that, absent clear Congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfers. See United States v. Bass, 404 U.S. 336, 349 (1971)("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.")

> A second statutory provision, section 510(2), similarly provides:
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> Except as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Like section 101(g), this provision supports the notion that Congress did not intend administration of the CWA to unduly interfere with water resource allocation.

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[8] PUD No. 1 of Jefferson County. v. Wash. State Dep't. of Ecology, 511 U.S. 700, 720 (1994)("Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.").

Finally, one section of the Act – 304(f) – expressly addresses water management activities. This section directed EPA to issue guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants,[9] as well as processes, procedures and methods to control pollution from, among other things, "changes in the *movement, flow or circulation of any navigable waters or ground waters*, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." CWA 304(f)(2)(F) (emphasis added). While section 304(f) does not exclusively address nonpoint sources of pollution,[10] it nonetheless "concerns nonpoint sources" (Miccosukee, 541 U.S. at 106) and reflects an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program. This interpretation accords with the direction to EPA and other federal agencies in section 101(g) to work with State and local agencies to develop "comprehensive solutions" to

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[9] Sources not regulated under sections 402 or 404 are generically referred to as "nonpoint sources." See National Wildlife Fed'n v. Consumers Power Co. 862 F.2d 580, 582 (6th Cir. 1988) ("'nonpoint source' is shorthand for and 'includes all water quality problems not subject to § 402'")(quoting National Wildlife Fed'n v. Gorsuch, 693 F.2d 156,166) (D.C. Cir. 1982)(internal quotation marks omitted)).

[10] Mere mention of an activity in section 304(f) does not mean it is exclusively nonpoint source in nature. See Miccosukee at 106 (noting that section 304(f)(2)(F) does not explicitly exempt nonpoint sources if they also fall within the definition of point source). Nonetheless, section 304(f) is focused primarily on addressing pollution sources outside the scope of the NPDES program. See H.R. Rep. No. 92-911, at 109 (1972), reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972, Vol. 1 at 796 (Comm. Print 1973)("[t]his section . . . on . . . nonpoint sources is among the most important in the 1972 Amendments")(emphasis added)).

water pollution problems "in concert with programs for managing water resources."

Thus, these sections of the Act together demonstrate that Congress was aware that there might be pollution associated with water management activities, but chose to defer to comprehensive solutions developed by State and local agencies for controlling such pollution. Because the NPDES program only focuses on water pollution from point source discharges, it is not the kind of comprehensive program that Congress believed was best suited to addressing pollution that may be associated with water resource management.

In contrast with these provisions of the statute which expressly address water management activities, the general prohibition and definition sections of the statute do not explicitly discuss water management. Section 301(a) of the Act proscribes "the discharge of any pollutant by any person" except in compliance with specified sections of the CWA, including section 402. "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12). While the statute does not define "addition," sections 101(g), 102(b), 304(f) and 510(2) provide a strong indication that the term "addition" should be interpreted in accordance with those more specific sections of the statute. In light of Congress' clearly expressed policy not to unnecessarily interfere with water resource allocation and its discussion of changes in the movement, flow or circulation of any navigable waters as sources of pollutants that would not be subject to regulation under section 402, it is reasonable to interpret "addition" as not generally including the mere transfer of navigable waters.

The overall structure of the statute further supports this conclusion. In several important ways, water transfers are unlike the types of discharges that were the primary

focus of Congressional attention in 1972. Discharges of pollutants covered by section 402 are subject to "effluent" limitations. Water transfers, however, are not like effluent from an industrial, commercial or municipal operation. Rather than discharge effluent, water transfers release one navigable water into another. There is no indication that Congress intended to subject the navigable waters themselves to effluent limitations.

Congress also recognized that the operators of water control facilities are frequently not responsible for the presence of pollutants in the waters they transport. Rather, those pollutants often enter "the waters of the United States" through point and nonpoint sources located far from those facilities and beyond control of the project operators. Congress properly envisioned that the project operators should not be saddled with curing those regional water quality problems through the Clean Water Act's NPDES permitting regime. Indeed, Congress generally intended that pollutants be controlled at the source whenever possible. See S. Rep. No. 92-414, p. 77 (1972) (justifying the broad definition of navigable waters because it is "essential that discharge of pollutants be controlled at the source").[11] Rather, those problems are more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source. See, e.g., CWA § 102(b) (reservoir planning); CWA § 208(b)(2)(F) (land use planning to reduce agricultural nonpoint sources of pollution); CWA § 319 (nonpoint source management programs); and CWA § 401 (state certification of federally licensed projects).

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[11] Recognition of a general intent to control pollutants at the source does not mean that dischargers are responsible only for pollutants that they generate; rather, point sources need only convey pollutants into navigable waters to be subject to the Act. See Miccosukee at 105. Municipal separate storm sewer systems, for example, are clearly subject to regulation under the Act. CWA § 402(p).

The Agency, therefore, concludes that, taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress did not generally intend to subject water transfers to the NPDES program, Rather, Congress intended to leave oversight of water transfers to water resource management agencies and the States.

B. Legislative History

The legislative history of the Clean Water Act also supports this conclusion. First, the legislative history of section 101(g) reveals that "[i]t is the purpose of this [provision] to insure that State [water] allocation systems are not subverted." 3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95-14, A Legislative History of the Clean Water Act of 1977, at 532 (1978); see PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 721 (1994).

Notably, the legislative history of the Act discusses water flow management activities only in the context of the nonpoint source program. In discussing section 304(f), the House Committee Report specifically mentioned water flow management as an area where EPA would provide technical guidance to States for their nonpoint source programs, rather than an area to be regulated under section 402.

> This section and the information on such nonpoint sources is among the most important in the 1972 Amendments. . . . The Committee, therefore, expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as . . . natural and manmade changes in the normal flow of surface and ground waters.

H.R. Rep. No. 92-911, at 109 (1972)(emphasis added).

In the legislative history of section 208 of the Act, the House Committee report noted that in some States, water resource management agencies allocating stream flows are required to consider water quality impacts. The Report stated:

> [I]n some States water resource development agencies are responsible for allocation of stream flow and are required to give full consideration to the effects on water quality. To avoid duplication, the Committee believes that a State which has an approved program for the handling of permits under section 402, and which has a program for water resource allocation should continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system."

H.R. Rep. No. 92-911, at 96 (1972).

Thus, Congress recognized that water resource management agencies were already addressing water quality issues associated with water resources management. While the new section 402 permitting program would now also have responsibility for addressing water quality issues, Congress did not indicate that it intended a wholesale transfer of responsibility away from water resource agencies for overseeing water transfers to the NPDES authority. Indeed, such a result would have been directly contrary to its desire for authority to remain at the State level, because NPDES authority was initially vested in EPA. Rather, Congress encouraged States to obtain approval of authority to administer the NPDES program under section 402(b) so that the NPDES program could work in concert with

water resource agencies' oversight of water management activities to ensure a "balanced management control system." Id.

C. Conclusion

In sum, the language, structure, and legislative history of the statute all support the conclusion that Congress did not intend to subject water transfers to the NPDES program. Water transfers are an integral part of water resource management; they embody how States and resource agencies manage the nation's water resources and balance competing needs for water. Water transfers also physically implement State regimes for allocating water rights, many of which existed long before enactment of the Clean Water Act. Congress was aware of those regimes, and did not want to impair the ability of these agencies to carry them out. Finding the NPDES program generally inapplicable to water transfers is true to this intent and the structure of the Clean Water Act, and gives meaning to sections 101(g) and 304(f) of the Act.

Thus, we reject the view that Congress intended in 1972 to subject water transfers to an entirely new federal regulatory regime imposing effluent limitations envisioned principally for industrial and municipal discharges. That interpretation runs directly counter to Congress's recognition of the need for balanced and comprehensive approach to the allocation of water resources and ignores the statutory scheme that emphasizes control of pollutants at their source where possible.

IV. Caselaw

Several judicial decisions have addressed whether dams, hydropower facilities and water transfers are subject to the NPDES permitting requirement. In general, there

have been two lines of cases. One line of cases (the dams cases) has addressed whether dams and hydropower facilities are subject to the NPDES program. See National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C.Cir. 1982) and National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988). These cases have held that such facilities do not "add" pollutants and therefore are not subject to section 402 permit requirements. In two other cases (the water pumping cases), appellate courts have addressed whether the pumping of water between two different navigable waters required NPDES permits. Dubois v. U.S. Dep't. of Agric., 102 F.3d 1273 (1st Cir. 1996); Catskill Mountains Chanter of Trout Unlimited v. City of New York, 273 F.3d 481 (2d Cir. 2001). In these cases, the courts held that a permit was required.

The two lines of cases took fundamentally different analytical approaches to construing the statute. In the dams cases, the courts adopted an approach similar to that articulated in this interpretation, looking to the CWA as a whole to discern Congressional intent. The water pumping cases, in contrast, were premised solely on the definition of "discharge of a pollutant" in section 502(12) and general statutory purposes. Application of this narrow approach here is undercut by the Supreme Court's analysis in Miccosukee. Furthermore, for the reasons discussed above, it is our view that the analysis applied in the dams cases, determining Congressional intent based on the CWA as a whole, is more appropriate here.

A. The Dams Cases

EPA's longstanding position has been that dams and hydropower facilities do not "add" pollutants when they are merely moving water from one location to another

within the same waterbody.[12] In Gorsuch, the plaintiff National Wildlife Federation brought suit seeking a declaration that water quality changes caused by dams – low dissolved oxygen, dissolved minerals and nutrients, sediment, temperature changes and supersaturation – required NPDES permits. While acknowledging that dams contributed to these water quality issues, EPA argued that no permit was required because the impoundment and diversion of water through the dam did not physically introduce a pollutant from the outside world into navigable waters.

The Gorsuch court concluded that Congress had not spoken to the precise question of whether dams required NPDES permits, and upheld EPA's interpretation as reasonable, noting that "[t]hroughout its consideration of the Act, Congress' focus was on traditional industrial and municipal wastes; it never considered how to regulate facilities such as dams which . . . convey . . . polluted waters downstream." 693 F.2d at 175.

In upholding EPA's interpretation, the Gorsuch court recognized the importance of the NPDES program in the overall CWA regulatory scheme, but noted that Congress chose not to require NPDES permits in all circumstances. Id. at 176. Indeed, the court acknowledged that Congress also expressly chose to allow States to address certain pollution problems through areawide waste management plans under section 208 of the statute. The court also noted that several provisions of the statute that

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[12] Where water diversion facilities, such as dams, add pollutants such as oil and grease from machinery operations to water passing through the diversion structure into the downstream water, NPDES permits are required. Consumers Power, 862 F.2d at 588; Gorsuch, 693 F.2d at 165, n. 22. Nothing in this Agency interpretation affects EPA's longstanding approach to regulation of such discharges under section 402.

relate specifically to water diversion facilities, including section 304(f), supported EPA's position.

While noting the strong environmental goals expressed in section 101 of the CWA, the court highlighted that Congress "did not want to interfere any more than necessary with state water management, of which dams are an important component." Id. at 178-79. "In light of its intent to minimize federal control over state decisions on water quantity," the Court noted that "Congress might also, if confronted with the issue, have decided to leave control of dams insofar as they affect water quality to the states." Id. at 178-79 (emphasis in original). Citing the Act's legislative history, the Court concluded that "[s]uch a policy would reduce federal/state friction and would permit States to develop integrated water management plans that address both quantity and quality." Id. at 179, (citing H.R. Rep. No. 92-911, at 96 (1972)).

The Gorsuch court also noted several policy considerations that supported the reasonableness of EPA's decision not to require NPDES permits for dams, including: (1) that dam-caused pollution depends partly on whether other sources have polluted the water upstream, greatly complicating the issuance of nationally uniform standards; (2) dams are a major component of State water management activities, providing irrigation, drinking water, and flood protection, complexities that "the NPDES program was not designed to handle, it may be that state areawide water quality plans are the better regulatory tool." Gorsuch, 693 F.2d at 182.

Finally, the court noted that if dam-caused pollution was "truly of major proportions," EPA or environmental organizations "would most likely have brought it to Congress' attention , either in 1972 or in 1977" and that "[u]nless and until Congress addresses the matter," the

court could not say that EPA was required to regulate dams under section 402. Id. at 183.

In the second leading dam case, Consumers Power, the 6th Circuit addressed the similar question of whether a hydropower facility that pumped water from Lake Michigan to a reservoir, and then released the water back to the lake to generate electricity, required an NPDES permit. In the course of the diversion, some fish that had been contained in the lake were entrained in the pumps, chopped up and then subsequently discharged back to the lake. The 6th Circuit agreed with Gorsuch and deferred to EPA's position that an NPDES permit was not required for the release of the dead fish by the hydropower facility into Lake Michigan. The court noted that "Congress apparently intended that pollution problems caused by dams and other flow diversion facilities are generally to be regulated by means other than the NPDES permit program," 862 F.2d at 587. Citing section 304(f)(2)(F) of the statute, the court concurred with the D.C. Circuit's view that "generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the 'nonpoint source' category of pollution." Id. at 588. The court also declined to distinguish the hydropower facility in that case (which pumped water out of Lake Michigan), from other similar facilities or dams that sit in a stream bed and rely upon passive diversion of water, finding that whether facilities "involve a passive diversion, or pumped movement of water," the cases are fundamentally the same. Id. at 589.

These cases examined the CWA as a whole and concluded that it was more consistent with the overall statutory scheme to subject water flow diversions to State nonpoint planning processes rather than the NPDES program.

B. The Pumping Cases

Prior to Miccosukee, two other courts reached different conclusions based on a literal interpretation of the term "addition," holding that certain activities required NPDES permits.

In Dubois, the plaintiff claimed that the U.S. Forest Service should not have authorized the expansion of a ski facility because, among other reasons, the facility had failed to obtain an NPDES permit to pump water uphill from a river to a mountainside pond as part of its snowmaking operation. Based on EPA's position that a permit was not required for the transfer, the Forest Service argued that the water pumped from the river to the pond had not lost its status as a water of the U.S. and therefore pollutants were not introduced to the pond from the outside world. The Forest Service also pointed out that the pond drained into the river and therefore the pond and the river were hydrologically connected and of like quality. The 1st Circuit, however, concluded that the water from the river would never reach the pond "naturally" since the flow of water was downhill from the pond to the river, that water passed through the ski facility's privately owned pipes on its way to the pond, and that the two water bodies were not necessarily of like quality. Based upon these conclusions, the court held that the two waters were "distinct" and that introduction of pollutants by the pumping was an addition for which a permit was required.

In Catskill Mountain, the plaintiffs claimed that water pumped from a reservoir in upstate New York through a tunnel into a creek on its way to being used as drinking water for New York City required a permit. The court held that an "addition"" means the introduction of a pollutant from the outside world, but only "provided that 'outside world' is construed as any place outside the particular water body to which pollutants are added." 273 F.3d at 491. The 2nd Circuit characterized Gorsuch and Consumers Power as involving recirculation of water

within essentially the same waterbodies, and held that no permit was required there because nothing was being added to them. The court contrasted those cases with the facts before it, where water was pumped several miles to an otherwise unconnected body of water. On those facts, the court held that a permit was required.

These cases discerned Congressional intent solely based on one term in section 502(12) of the statute - "addition." To determine whether the pumps added pollutants to the navigable waters, the courts applied a dictionary understanding of the term "addition" as increasing the amount of pollutants in the receiving water. They determined that a permit was required because the transfer increased the amount of certain pollutants in the receiving waterbody that would not have occurred in the absence of the transfer.

While focusing solely on the term "addition" is one approach to interpreting the statute,[13] the better approach here, as discussed above, takes a holistic view and also gives meaning to those statutory provisions where Congress expressly considered the issue of water resource management, as well as Congress' overall division of responsibility between State and federal authorities under the statute.

However, even if the inquiry were narrowly limited to construing the term "addition" contained in section 502(12), the pumping cases' reasoning has been

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[13] The government's amicus curiae brief before the Supreme Court in Miccosukee also focused on the term "addition." The brief reached a different result than the lower court decisions, in part, because it framed the equation differently - i.e., whether the pumping of water increased the sum of pollutants in the navigable waters as a whole, as opposed to the particular receiving water. See also infra note 14 and accompanying text.

significantly undercut by the Supreme Court's decision in Miccosukee, as discussed below.

C. The Supreme Court Decision in Miccosukee

In Miccosukee, the plaintiffs claimed that a permit was required for the pumping of water by the South Florida Water Management District from a canal (the C-11 canal) containing urban stormwater runoff, including phosphorus, through a pump (S-9 pump) into an undeveloped water conservation area (WCA-3). The district court granted summary judgment for the plaintiffs, finding that the C-11 canal and WCA-3 were two separate bodies of water of differing water quality and that water would not naturally flow from the canal into the conservation area. The 116 Circuit affirmed, finding that "but for" the pumping, water would not have flowed naturally from the canal into the conservation area. Therefore, the court found that the S-9 pump was the cause-in-fact of the discharge, and a permit was required. The Supreme Court granted the Management District's petition for certiorari.

After rejecting arguments by the petitioner that a discharger is liable only for pollutants that originate from the point source itself, the Court addressed arguments by the Management District and the United States that a permit was not required because navigable waters should be viewed unitarily for purposes of the NPDES permit requirement. Under this argument, mere conveyance of one navigable water into another did not add pollutants because they were already contained in the navigable waters, The Court noted that EPA had not articulated this position in any administrative documents and raised several concerns with the theory. 54I U.S. at 107.[14]

[14] The Court stated that the unitary waters theory could be viewed as inconsistent with statutory provisions focusing on protection of

Ultimately, the court declined to address the unitary waters theory, finding that the argument had not been raised below or articulated by the agency in any administrative context.

Finally, the Court addressed the parties' disputes about whether the C-I 1 canal and WCA-3 were hydrologically indistinguishable parts of a single water, as contended by the Management District and the United States, or two distinct waters. The Court noted certain facts supporting the view that the canal and conservation area were part of a single water, including significant seepage between the two, and the fact that they overlay the same porous aquifer. While the Court agreed with the lower courts' factual finding that water would not initially flow "naturally" into the WCA-3 if the pumps were turned off, the Court found that the lower courts had failed to consider the long-term effects of shutting down the pumps on the relationship between the waters, as well as other important facts. Finding that the district court had granted summary judgment prematurely without having resolved important factual questions, the Court remanded the case to the district court to determine whether the canal and the conservation areas were "meaningfully distinct water bodies." If they were not meaningfully distinct, then no permit would be required. Miccosukee, 541 U.S. at 112. The Court did not explain or define this term.

The Supreme Court's decision is relevant to this Agency interpretation in three respects. First and foremost, the Court expressly reserved judgment on the legal theory that applies in deciding whether the NPDES program

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individual water bodies, and that the theory was potentially inconsistent with the NPDES regulations for intake credits, which regulate movement of water among waterbodies. 541 U.S. at 106-07. The present Agency interpretation reflects EPA's consideration of the Court's concerns.

applies to water transfers, noting that the Agency had not taken a position in an administrative context. By leaving the matter open, the Court essentially invited the Agency to speak to the broad legal issues in the first instance.

Second, the Supreme Court signaled that the statute needed to be construed in light of not only the language in sections 301(a) and 502(12), but also other provisions addressing management of water resources, in particular section 101(g). The Court stated, "It may be that construing the NPDES program to cover such transfers would . . . violate Congress' specific instruction that 'the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired' by the Act." Id. at 108 (citing section 101(g)). By not confining itself to interpreting solely the meaning of the term "addition," the Court's decision undercut the narrow analytical approach of the pumping cases.

Third, the Supreme Court undercut the reasoning of Catskill Mountain and Dubois by taking a broader approach to evaluating the relationship between two waters than was taken in those decisions. The Court in Miccosukee recognized that the pumping was uphill: "The District Court certainly was correct to characterize the flow through the S-9 pump station as a nonnatural one, propelled as it is by diesel-fired motors against the pull of gravity." Id. at 111. In the Court's view, however, this fact was not dispositive. Rather, the Court looked more broadly to other factors, such as seepage between the waters and the long-term effects if pumping were ceased. Thus, the Court's decision casts significant doubt on the validity of simplistically applying a "but for/natural flow" test followed by the appellate courts in the pumping cases and instead calls for a broader evaluation of the relationship between waters.

V. Any Application of the Term "Meaningfully Distinct" Should Reflect Congressional Intent

While the Agency believes Congress intended to leave the oversight of water transfers to water resource management agencies and the States, if EPA were required, for example in a judicial proceeding, to make a factual determination as to whether a waterbody is "meaningfully distinct," the Agency would construe this term in light of Congressional intent. The following factors would be relevant to applying this term in a particular case.

The term "meaningfully distinct" suggests a two-part test for deciding whether a water transfer might constitute an addition: (1) the waters must be distinct, and (2) the distinction between them must be meaningful. We address these steps in turn.

First, to determine whether waters are distinct, the full range of hydrologic connections should be considered, both natural and man-made. The nation's waters have been extensively altered by human activity for centuries, in some cases drastically so. In some areas of the country, vast networks for delivery of water have been created. In some cases, waters that were historically one waterbody have been separated into smaller water segments. Some, once created, continue to operate via the natural force of gravity, while others involve a combination of human-caused diversions, pumps and flow controls along with natural forces. Given these extensive modifications, in many cases longstanding, it can be difficult to distinguish "natural" from human-induced water flows. Considering the full range of hydrologic connections is appropriate in light of how broadly the Supreme Court was willing to look at the relationship between the waterbodies in Miccosukee. Moreover, Congress recognized in the CWA that both natural and man-made activities have altered the

hydrologic landscape. See, e.g., H.R. Rep. No. 92-911, at 109 (1972)(discussing EPA's duty under section 304(f) of the statute to provide guidance to States on "natural and manmade changes in the normal flow or surface and ground waters")(emphasis added). Finally, under the CWA, it has long been accepted that the statute applies to all waters that meet the statutory and regulatory definitions of navigable waters, regardless of whether human activity may have contributed to making the water what it is today. Leslie Salt Co. v. U.S, 896 F.2d 354 (9'' Cir. 1990). It is consistent with that principle to consider both natural and manmade hydrologic features in deciding whether waters are distinct.

Thus, where two waters have been or are hydrologically connected, through human activity or otherwise, this factor strongly supports the conclusion that they are not "distinct." In some cases, the waters may have a history of having been integrated or they may have become integrated through natural changes or human activity over time. In either case, the connection has integrated the waters and they are logically not "distinct"

Nor would it be logical to conclude that waters are distinct where they have been connected by a conveyance that happens to move the water uphill via a pump as opposed to water moving downhill via gravity. The critical question is whether the waters are distinct. This question was squarely addressed by the 6th Circuit in Consumers Power, where the plaintiffs alleged the case was distinguishable from the dam at issue in Gorsuch because the facility was not located in the streambed, but rather required water to be pumped uphill into a holding reservoir as part of the operation. The court disagreed that this distinction mattered: "[Hydro-electric power facilities, whether they ... involve a passive diversion, or pumped movement of water, are fundamentally the same...." 862 F.2d at 589. The decision in Miccosukee also implicitly

rejected the notion that simply having to move water uphill meant that waters were distinct, since the Court did not fund that fact to be dispositive.

Because the full breadth of the historical and ongoing hydrological conditions would be relevant to deciding whether waters are distinct, it would not make sense to ignore, as have some of the appellate court decisions, the water transfer itself in deciding whether two waters are distinct. In some cases, as in the case of the S-9 pump, the transfers have been going on for decades and even predate enactment of the CWA Such connections have been as much a part of the hydrological landscape as naturally created ones and, over time, may be difficult to distinguish from the "natural" hydrologic regime, Where two navigable waters are connected by a water transfer, they have become closely intertwined in the hydrological landscape and may even be considered part of the same tributary system. The length of time that the connection has been in place could be relevant to determining whether the waters are distinct.

If waters are distinct, the next question under the Supreme Court's decision is whether the distinction between the waters is "meaningful." Again, the Supreme Court's decision does not provide any guidance for interpreting this term. However, the fact that the Supreme Court indicated that there must be a "meaningful" distinction suggests that it is not sufficient for the waters simply to be distinct to potentially trigger the permitting requirement. Rather, over and above any hydrologic distinction between the waters, a distinction must rise to the level of being "meaningful" in order to potentially require an NPDES permit.

In the absence of specific guidance by the Supreme Court, the term "meaningfully" should be applied in light

of Congressional intent to both protect water quality[15] and rely on States and water resource management for oversight of water transfers. In this context, a "meaningful" distinction would refer to transfers that would have a meaningful, or significant, adverse effect on water quality that is not being adequately addressed by States and water resource management agencies. Thus, it would be appropriate to consider in the first instance whether there are exiting laws, regulations or programs that are being implemented that adequately address the types of water quality concerns associated with the water transfer at issue.[16] The States retain full sovereign authority to regulate water quality within their jurisdiction, see CWA § 510, and the States have independent authority to prevent the pollution of the state's waters and to protect human health and wildlife, including aquatic life. For

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[15] In this Agency interpretation "water quality" includes physical, chemical and biological integrity.

[16] An example of an existing federal law, is the Comprehensive Everglades Restoration Plan (CERP), Pub. L. No.106-541, § 601, 114 Stat. 2754 (2000), under which Congress authorized a comprehensive plan within the defined South Florida Ecosystem "for modifications and operational changes to the Central and Southern Florida Project that are needed to restore, preserve, and protect the South Florida Ecosystem while providing for other water-related needs of the region, including water supply and flood protection." § 601(b)(1)(A). Congress mandated that "the Plan shall be implemented to ensure the protection of water quality," 4, by requiring the Secretary of the Army to consider applicable state water quality standards and "include such features as the Secretary determines are necessary to ensure that all ground water and surface water discharges from any project feature authorized by this subsection will meet all applicable water quality standards and applicable water quality permitting requirements." § 601(b)(2)(A)(ii). CERP specifically includes water storage, water transfer and water treatment projects within the Congressional authorization.

example, many State laws addressing water diversions expressly authorize consideration of water quality impacts. In addition, where a water transfer is of environmental concern due to nonpoint source contributions to the donor water, the State may have authorities under its nonpoint source program to address the problem. Where such authorities are being adequately implemented, it would be consistent with Congressional intent to defer to them.[17]

Where authorities are not being implemented to address the water quality concerns, we believe other factors would be relevant to determining whether there is a "meaningful" distinction between waters. It would be logical to inquire first into the degree of similarity or differences between the waters. The differences in the chemical, physical and biological characteristics should be significant in order to be considered meaningful. Merely because two waterbodies may be dissimilar does not mean, however, that any transfer between them would be environmentally meaningful within the context of the CWA. Rather, the specific context of the transfer should be evaluated to determine whether the transfer would have a substantial adverse impact on the receiving waterbody.

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[17] While an NPDES permit may not be required for a particular water transfer, existing NPDES and water quality standards regulations still can *ensure* protection of receiving waters. Point source dischargers to the donor waterbody will need to have limits as stringent as necessary to meet the water quality requirements of all affected States, which would include the applicable water quality standards in the "downstream" receiving water. 40 C.F.R. § 122.4(d). Further, in designating uses of the upstream water and the appropriate criteria for that water, "the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b)(emphasis added). A waterbody receiving a water transfer would be a "downstream" water for purposes of these regulations.

VI. Scope of this Agency Interpretation

This Agency interpretation addresses only water transfers - that is, activities that convey or connect navigable waters without subjecting the water to intervening industrial, municipal or commercial use.[18] It does not address any other activities, or any jurisdictional terms under the statute other than "addition."[19]

For example, this interpretation does not affect EPA's longstanding position that, if water is withdrawn from navigable waters for an intervening industrial, municipal or commercial use, the reintroduction of the intake water and associated pollutants is an "addition" subject to NPDES permitting requirements. EPA has long imposed NPDES requirements on entities that withdraw process water or cooling water and then return some or all of the water through a point source. See., e.g., 40 C.F.R. § 122.2 (definition of process wastewater); 40 C.F.R. §§ 125.80-125.89 (regulation of cooling towers); 40 C.F.R. § 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 C.F.R. Part 132, Appendix F, Procedure 5-D (containing regulations governing water quality-based permitting for intake pollutants in the Great Lakes). Conversely, waters that are

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[18] We emphasize, for purposes of clarity, that a water transfer occurs between two 'waters of the United States." Accordingly, the movement of water through a dam is not a water transfer because the dam merely conveys water from one location to another within the same waterbody (although the movement of water through a dam also does not require an NPDES permit because no "addition" has occurred). Moreover, a discharge from a waste treatment system, for example, which by definition is not a water of the United States, to a water of the United States, would not constitute a water transfer (and would require an NPDES permit). See 40 C.F.R. § 122.2.

[19] Thus, this interpretation does not address the meaning of the terms, "point source," "pollutant" or "navigable waters."

diverted and used for irrigation and then reintroduced to the navigable waters are exempt from permitting requirements under the exemption for return flows from irrigated agriculture from the definition of "point source" in section 502(14) and this Agency interpretation does not affect that exemption.

The activities addressed by this Agency interpretation also stand in sharp contrast to other activities that have long been subject to the Clean Water Act's permitting requirements. For example, section 402 subjects placer mining of ore deposits in streams and rivers to the NPDES permitting program because the process results in the excavation and point source discharge of dirt and gravel into navigable waters. See Rybachek v. EPA 904 F.2d 1276, 1285 (9th Cir. 1990). Similarly, section 404 of the Clean Water Act subjects the deposit or redeposit of dredged or fill material to a specialized permitting program because that activity results in the point source discharge of those materials into navigable waters. CWA § 404; United State v. Deaton, 209 F.3d 331, 335-336 (4th Cir. 2000); United States v. M.C.C. of Fla., Inc., 772 F.2d 1501, 1503-1506 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir. 1988); Avoyelles Sportsmen's League. Inc, v. Marsh, 715 F.2d 897, 923-925 (5th Cir. 1983). The Clean Water Act also clearly imposes permitting requirements on publicly owned treatment works, and large and medium municipal separate storm sewer systems. See CWA §§ 4O2(a), 402(p)(1)-(4). Congress amended the Clean Water Act in 1987 specifically to add new section 4O2(p) to better regulate storm water discharges from point sources. Water Quality Act of 1987, Pub. L No. 100-4, 101 Stan 7 (1987).

Again, this interpretation does not affect EPA's longstanding regulation of such discharges.[20]

VII. Conclusion

For the reasons explained above, based on the CWA as a whole, the Agency concludes that Congress intended to leave the oversight of water transfers to authorities other than the NPDES program. While resort to a case-specific evaluation of waters is not necessary or appropriate in light of Congressional intent, if such an evaluation were determined to be needed, a permit would not be required for waters that are not "meaningfully distinct" and that term should be construed in light of the water quality goals of the statute and Congressional intent to rely on non-NPDES authorities for overseeing water management activities. Finally, the Agency intends to initiate a rulemaking process to address water transfers.

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[20]This Agency interpretation also does not change EPA's longstanding position, upheld by the Supreme Court in Miccosukee, that the definition of "discharge of a pollutant" in the CWA includes coverage of point sources that do not themselves generate pollutants. The Supreme Court stated, "A point source is, by definition, a 'discernible, confined, and discrete conveyance' § 1362(14) (emphasis added). That definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters,' which are, in turn, defined as 'the waters of the United States.' § 1362(7)." Miccosukee, 541 U.S. at 105.